Jaya bin Asahak v Munggau ak Lawai & Ors

HIGH COURT (BINTULU) — SUIT NO 22–01 OF 2002 (BTU)
ABDUL AZIZ ABDUL RAHIM J
31 MARCH 2010

Evidence — Documentary evidence — Oral evidence to explain contents of documentary evidence — Whether court should disregard oral evidence — Evidence Act 1950 ss 93 & 94

Evidence — Expert evidence — Principles applicable — Whether expert evidence could be challenged by another expert

Native Law and Custom — Land dispute — Customary rights over land — Whether plaintiff rightfully inherited disputed cave — Proof of customary rights over land — Whether fourth and fifth defendants wrongfully refused to issue birds' nest licence to plaintiff — Sarawak Land Code (Cap 81) s 5

The plaintiff, who claimed to have acquired rights to a birds' nest cave situated on Bukit Lumut ('the disputed cave') from his ancestors, alleged that the first, second and third defendants had trespassed into the disputed cave and started stealing and extracting birds' nests without the plaintiff's permission or consent. The plaintiff further averred that the first to third defendants had unlawfully and by using threat of bodily harm and violence to the plaintiff had forced the latter to sign over the ownership and rights over the disputed cave to the first, second and third defendants under two instruments, namely, the deed of assignment and the statutory declaration. The plaintiff thus commenced the instant action against the first to third defendants where it sought various declarations, inter alia: a declaration that the plaintiff was the owner of the disputed cave and a declaration that the deed of assignment and the statutory declaration were illegal, void, unenforceable and/or contrary to public policy. The plaintiff's claim against the Director of Forest, Sarawak ('the fourth defendant') and the Government of Sarawak ('the fifth defendant') was premised on the grounds that the fourth and fifth defendants had wrongfully refused to issue a bird's nest licence to the plaintiff to collect bird's nests from the disputed cave. The plaintiff further alleged that the fourth defendant had wrongly, improperly and illegally issued and continued to issue the first to third defendants with licences to collect or sell bird's nests from the disputed case. It was thus the plaintiff's case that as from around October 2000 the plaintiff had been excluded from his rights to use and enjoy the disputed cave and to extract

bird's nests therefrom and he had thus suffered loss and damage. In their defence the first to third defendants averred that they had acquired native customary rights ('NCR') over the disputed cave either under the Sarawak Land Code or under the Wildlife Protection Ordinance 1998 or under the common law. The first to third defendants also alleged that they had discovered the disputed cave by accident in 1995 and had written to the District Officer of Tatau/Bintulu to this effect. Additionally the first to third defendants contended that the plaintiff had vide the deed of assignment and the statutory declaration relinquished his rights over the disputed cave to the first to third defendants. The first to third defendants also claimed to have been issued with a licence by the fourth defendant to enter and extract birds' nests from the disputed cave. Based on these averments the first to third defendants filed their defence and a counterclaim against the plaintiff seeking similar declarations as sought by the plaintiff on the ownership and rights over the disputed cave as well as damages for trespass and assault. During the course of the trial the plaintiff relied on expert evidence to establish the exact location of the disputed cave to prove that it was not situated where the first to third defendants alleged it was. Based on this and other evidence the plaintiff submitted that the first to third defendants had presented a false claim over the disputed cave since 1995 and had misled the fourth defendant to issue them a licence to enter and extract bird's nests from the disputed cave. The first to third defendants also called upon their experts to testify on their behalf. The main issue for determination in this case was whether the plaintiff had rightfully inherited the disputed cave.

Held, allowing the plaintiff's claims in part with costs:

(1) Expert evidence can only be challenged by another expert, and in the present case the evidence tendered by the plaintiff's expert by way of the survey report on the location of the disputed cave remained unchallenged and supported the plaintiff's claim. The cumulative effect of all the documentary and expert evidence was that it proved on the balance of probability that the disputed cave was never part of the area in which the first to third defendants had been issued with licence to collect birds' nests. It also showed that the defendants had never established any rights to collect birds' nests from the disputed cave (see paras 34, 41 & 64).

(2) The *temenggung* for the Malay and Melanau community in the whole of the Bintulu area had testified that Asahak bin Lana, the plaintiff's father was a Melanau and that after he died the plaintiff had inherited the caves and that his elders had given him their rights and authorised the plaintiff who was the *waris tunggal* to manage the caves. This part of the *temenggung*'s evidence about ownership of the disputed cave, which was corroborated by the 1954 official documents and Memorandum of the District Officer of Bintulu, was crucial because it was largely unchallenged and had to be given proper weight. The

evidence also showed that the first to third defendants had no certification from their local headman to support such purported claim to the disputed cave in 1995. In any case, their claim that the disputed cave was discovered by them in 1995 goes against s 5 of the Sarawak Land Code, which is the general law as to land matters and NCR claim over lands in Sarawak and which does not permit any claim for NCR after 1 January 1958. The first to third defendants' counterclaim was also without basis and contrary to s 5 of the Sarawak Land Code (see paras 72–74, 76, 97–98 & 273).

(3) The documentary evidence did not support the first to third defendants' claim and applying ss 93 and 94 of the Evidence Act 1950 to the hard facts of the documentary evidence, the oral evidence to impeach the clear contents of the documentary evidence ought to be disregarded. The court should not allow any extrinsic evidence to explain the true and clear meaning of the contemporaneously made documentary evidence. In the light of the documentary evidence, the first to third defendants had failed to establish their linkage and inheritance over the disputed cave (see paras 51–52).

(4) In the present case, the fourth and fifth defendants had wrongfully refused to issue a bird's nest licence to the plaintiff because of the dispute that had arisen between him and the first to the third defendants over the disputed cave. The plaintiff had the locus standi to challenge that decision having regard to the fact that the plaintiff's rights to the caves had previously been recognised by the fourth and fifth defendants. Further, it had been satisfactorily proven that the plaintiff is the rightful owner to the disputed cave. The fourth and fifth defendants had improperly and illegally issued licences to the first, second and third defendants to enter and extract bird's nests from there (see paras 10, 108, 163, 168–169).

(5) As for the deed of assignment and the statutory declaration executed by the plaintiff, the decided cases suggest that NCR cannot be transferred by 'instruments'. Further the purported statutory declaration did not bear the stamp and seal of a qualified or certified interpreter. The deed of assignment required the plaintiff to pay a sum of RM20,000 and since there was no evidence of such payment, the said deed would be treated as void and then the statutory declaration would fall automatically (see paras 206 & 208–209).

[Bahasa Malaysia summary

Plaintif, yang mengatakan memperoleh hak terhadap gua sarang burung di Bukit Lumut ('gua yang dipertikaikan') daripada nenek moyangnya, mendakwa bahawa defendan pertama, kedua dan ketiga telah menceroboh ke dalam gua yang dipertikaikan itu dan mula mencuri dan mengeluarkan sarang

burung tanpa kebenaran atau persetujuan plaintif. Plaintif selanjutnya menegaskan bahawa defendan pertama hingga ketiga secara tidak sah dan dengan menggunakan ancaman kemudaratan ke atas tubuh badan dan keganasan ke atas plaintif telah memaksa plaintif menyerahkan pemilikan dan hak terhadap gua yang dipertikaikan itu kepada defendan pertama, kedua dan ketiga di bawah dua surat cara, iaitu, surat ikatan penyerahan hak dan akuan statutori. Plaintif dengan itu telah memulakan tindakan ini terhadap defendan pertama hingga ketiga di mana ia memohon pelbagai perisytiharan, antara lain: perisytiharan bahawa plaintif adalah pemilik gua yang dipertikaikan dan perisytiharan bahawa surat ikatan penyerahan hak dan akuan statutori itu menyalahi undang-undang, terbatal, tidak boleh dikuatkuasakan dan/atau bertentangan dengan polisi awam. Tuntutan plaintif terhadap Pengarah Perhutanan, Sarawak ('defendan keempat') dan Kerajaan Sarawak ('defendan kelima') adalah berdasarkan alasan-alasan bahawa defendan keempat dan kelima dengan salah telah enggan mengeluarkan lesen sarang burung kepada plaintif untuk mengumpul sarang burung dari gua yang dipertikaikan itu. Plaintif selanjutnya mengatakan bahawa defendan keempat dengan salah, tidak betul dan menyalahi undang-undang telah mengeluarkan dan terus mengeluarkan kepada defendan pertama hingga ketiga lesen-lesen untuk mengumpul atau menjual sarang burung dari gua yang dipertikaikan itu. Oleh demikian ianya kes plaintif bahawa sejak sekitar bulan Oktober 2000 plaintif telah dikecualikan haknya untuk menggunakan dan menikmati gua yang dipertikaikan itu dan untuk mengeluarkan sarang burung darinya dan dengan itu dia telah mengalami kerugian dan kerosakan. Dalam pembelaan mereka defendan pertama hingga ketiga menegaskan bahawa mereka telah memperoleh hak-hak adat anak negeri ('HHAAN') ke atas gua yang dipertikaikan sama ada di bawah Kanun Tanah Sarawak atau di bawah Ordinan Perlindungan Hidupan Liar 1998 atau di bawah *common law*. Defendan pertama hingga ketiga juga mengatakan bahawa mereka telah menemui gua yang dipertikaikan itu secara kebetulan dalam tahun 1995 dan telah menulis kepada Pegawai Daerah Tatau/Bintulu berkaitan dengannya. Tambahan pula defendan pertama hingga ketiga telah menegaskan bahawa plaintif melalui surat ikatan penyerahan hak dan akuan statutori melepaskan haknya ke atas gua yang dipertikaikan itu kepada defendan pertama hingga ketiga. Defendan pertama hingga ketiga juga mendakwa telah diberikan lesen oleh defendan keempat untuk memasuki dan mengeluarkan sarang burung dari gua yang dipertikaikan itu. Berdasarkan penegasan-penegasan tersebut defendan pertama hingga ketiga telah memfailkan pembelaan mereka dan tuntutan balas terhadap plaintif memohon deklarasi yang sama seperti dipohon oleh plaintif berhubung pemilikan dan hak ke atas gua yang dipertikaikan itu dan juga ganti rugi kerana pencerobohan dan serangan. Sepanjang perbicaraan plaintif telah bergantung kepada keterangan pakar untuk mendapatkan lokasi tepat gua yang dipertikaikan itu dengan tepat bagi membuktikan bahawa ia tidak terletak di mana yang dikatakan oleh defendan pertama hingga ketiga. Berdasarkan ini dan keterangan lain plaintif berhujah

bahawa defendan pertama hingga ketiga telah mengemukakan tuntutan palsu ke atas gua yang dipertikaikan sejak tahun 1995 dan telah mengelirukan defendan keempat untuk memberi mereka lesen untuk masuk dan mengeluarkan sarang burung dari gua yang dipertikaikan itu. Defendan pertama hingga ketiga juga telah memanggil ahli pakar mereka untuk memberi keterangan bagi pihak mereka. Isu utama untuk ditentukan dalam kes ini adalah sama ada plaintif telah mewarisi gua yang dipertikaikan itu secara sah.

Diputuskan, membenarkan sebahagian tuntutan plaintif dengan kos:

(1) Keterangan pakar hanya boleh dicabar oleh seorang pakar yang lain, dan dalam kes ini keterangan yang di kemukakan oleh pakar plaintif melalui laporan tinjauan ke atas lokasi gua yang dipertikaikan itu masih tidak dicabar dan menyokong tuntutan plaintif. Kesan kumulatif kesemua keterangan dokumentar dan pakar adalah bahawa ia telah membuktikan atas imbangan kebarangkalian bahawa gua yang dipertikaikan tidak pernah merupakan bahagian kawasan yang mana defendan pertama hingga ketiga diberikan lesen untuk mengumpul sarang burung. Ia juga menunjukkan bahawa defendan-defendan tidak membuktikan apa-apa hak untuk mengumpul sarang burung dari gua yang dipertikaikan itu (lihat perenggan 34, 41 & 64).

(2) Temenggung untuk masyarakat Melayu dan Melanau di seluruh kawasan Bintulu telah memberi keterangan bahawa Asahak bin Lana, bapa plaintif merupakan seorang Melanau dan bahawa setelah dia meninggal dunia plaintif telah mewarisi gua-gua tersebut dan bahawa abang dan kakaknya telah memberikan kepadanya hak-hak mereka dan memberi kuasa kepada plaintif yang merupakan waris tunggal untuk menguruskan gua-gua tersebut. Bahagian keterangan temenggung ini tentang pemilikan terhadap gua yang dipertikaikan itu, yang telah disokong oleh dokumen-dokumen rasmi 1954 dan Memorandum Pegawai Daerah Bintulu, adalah penting kerana ia tidak dicabar langsung dan patut diberikan perhatian yang wajar. Keterangan juga menunjukkan bahawa defendan pertama hingga ketiga tiada perakuan daripada ketua kaum mereka untuk menyokong tuntutan yang dimaksudkan untuk gua yang dipertikaikan itu pada tahun 1995. Dalam apa jua kes, tuntutan mereka bahawa gua yang dipertikaikan itu telah ditemui oleh mereka dalam tahun 1995 bertentangan dengan s 5 Kanun Tanah Sarawak, yang merupakan undang-undang am berkaitan hal-hal tanah dan tuntutan HHAAN ke atas tanah di Sarawak dan yang tidak membenarkan apa-apa tuntutan untuk HHAAN selepas 1 Januari 1958. Tuntutan balas defendan pertama hingga ketiga juga adalah tanpa asas dan bertentangan dengan s 5 Kanun Tanah Sarawak (lihat perenggan 72–74, 76, 97–98 & 273).

(3) Keterangan dokumentar tidak menyokong tuntutan defendan

pertama hingga ketiga dan dengan menggunakan ss 93 dan 94 Akta Keterangan 1950 kepada fakta keterangan dokumentar, keterangan lisan untuk mencabar kandungan jelas keterangan dokumentar patut tidak dipedulikan. Mahkamah tidak patut membenarkan apa-apa keterangan intrinsik untuk menjelaskan maksud sebenar dan nyata keterangan dokumentar yang telah dibuat masa itu. Berdasarkan keterangan dokumentar itu, defendan pertama hingga ketiga telah gagal membuktikan kaitan dan pewarisan mereka ke atas gua yang dipertikaikan itu (lihat perenggan 51–52).

(4) Dalam kes ini, defendan keempat dan kelima secara salah telah enggan memberikan lesen sarang burung kepada plaintif disebabkan pertikaian yang timbul antaranya dan defendan pertama hingga ketiga ke atas gua yang dipertikaikan itu. Plaintif mempunyai locus standi untuk mencabar keputusan tersebut dengan mengambilkira fakta bahawa hak plaintif terhadap gua-gua tersebut telah diakui sebelum ini oleh defendan keempat dan kelima. Selanjutnya, oleh sebab ia telah dibuktikan secara memuaskan bahawa plaintif adalah pemilik sah ke atas gua yang dipertikaikan itu defendan keempat dan kelima telah memberikan lesen-lesen secara salah dan menyalahi undang-undang kepada defendan pertama, kedua dan ketiga untuk memasuki dan mengeluarkan sarang burung dari situ (lihat perenggan 10, 108, 163, 168–169).

(5) Berhubung surat ikatan penyerahan hak dan akuan statutori yang disempurnakan oleh plaintif, kes-kes yang diputuskan mencadangkan bahawa HHAAN tidak boleh dipindah milik oleh 'instruments'. Selanjutnya akuan statutori yang dimaksudkan tidak mempunyai cap dan meterai jurubahasa yang layak atau diperakui. Surat ikatan penyerahan hak menghendaki plaintif membayar sejumlah RM20,000 dan memandangkan tiada keterangan tentang bayaran sedemikian, surat ikatan tersebut akan dianggap sebagai terbatal dan akuan statutori akan turut gagal secara automatik (lihat perenggan 206 & 208–209).]

Notes

For cases on customary rights over land, see 10 *Mallal's Digest* (4th Ed, 2008 Reissue) paras 655–664.

For cases on documentary evidence generally, see 7(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 1187–1385.

For cases on principle applicable, see 7(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 1614–1616.

Cases referred to

AEG Carapiet v AY Derderian AIR 1961 Cal 359 (refd)
Ayoromi Helen v PP [2005] 1 MLJ 699, CA (refd)

Barnard and others v National Dock Labour Board and another [1953] 1 All ER 1113, CA (folld)
Bisi ak Jinggot @ Hilarion Bisi ak Jenggut v Superintendent of Lands and Surveys Kuching Division & Ors [2008] 4 MLJ 415; [2008] 1 LNS 245, HC (refd)
Chua Wee Seng v Fazal Mohamed [1971] 1 MLJ 106, HC (refd)
Cooper v Wilson and others [1937] 2 KB 309, CA (folld)
Datuk Syed Kechik bin Syed Mohamed v Government of Malaysia & Anor [1979] 2 MLJ 101, FC (folld)
Eu Finance Berhad v Lim Yoke Foo [1982] 2 MLJ 37; [1982] 1 LNS 21, FC (folld)
Galau & Ors v Penghulu Imang & Ors [1967] 1 MLJ 192, HC (refd)
Haji Laugan Tarki bin Mohd Noor v Mahkamah Anak Negeri Penampang [1988] 2 MLJ 85, SC (folld)
Hollington v F Hewthorn & Company Limited [1943] 2 All ER 35, CA (refd)
Perumahan Farlim (Pg) Sdn Bhd & Ors v Cheng Hang Guan & Ors [1989] 3 MLJ 223, SC (refd)
Pesaka-Gammon Construction Sdn Bhd v Chuan Hin Electrical Engineering Sdn Bhd [2004] 1 LNS 423, HC (folld)
PP v Munusamy [1980] 2 MLJ 133, FC (refd)
Russian Commercial and Industrial Bank v British Bank for Foreign Trade, Limited [1921] 2 AC 438, HL (refd)
Saeng-Un Udom v PP [2001] 3 SLR 1, CA (refd)
Sagong bin Tasi & Ors v Kerajaan Negeri Selangor & Ors [2002] 2 MLJ 591, HC (refd)
Sat ak Akum & Anor v Randong ak Charareng [1958] SCR 104 (refd)
Sidau ak Sipok v TR Bilong ak Keseng (Appellate Native Court Case No R/3/94) (refd)
Sim Tiew Bee v PP [1973] 2 MLJ 200, FC (refd)
Sivalingam a/l Periasamy v Periasamy & Anor [1995] 3 MLJ 395, CA (refd)
Syed Abu Bakar bin Ahmad v PP [1984] 2 MLJ 19, FC (refd)
Tan Sri Haji Othman Saat v Mohamed bin Ismail [1982] 2 MLJ 177, FC (folld)
Teh Guan Teik v Inspector General of Police & Anor [1998] 3 MLJ 137, FC (folld)
Telekom Cellular Sdn Bhd (formerly known as MRCB Telecommunications Sdn Bhd) v Kabelect Sdn Bhd [2000] 3 MLJ 254; [2000] 3 CLJ 503, CA (folld)
Tindok Besar Estate Sdn Bhd v Tinjar Co [1979] 2 MLJ 229, FC (folld)

Legislation referred to

Civil Law Act 1956 ss 7, 8
Contracts Act 1950 ss 14, 15, 19, 24, 25, 26
Courts of Judicature Act 1964
Edible Birds' Nests Ordinance 1940 s 3
Evidence Act 1950 ss 32(d), (e), 93, 94, 114(g)
Forest Ordinance (Cap 126) s 19
Native Courts Ordinance 1992 ss 4(b), 4(2), (3), 5

Rules of the High Court 1980 O 15 r 16
Sarawak Interpretation Ordinance Schedule
Sarawak Land Code (Cap 81) ss 5, ss 5(2) s 104, 109
Wildlife Protection (Edible Birds' Nests) Rules 1998 rr 7(1), 8(1)
Wildlife Protection Ordinance 1998

Shankar Ram (Keith Chin with him) (Thomas, Shankar Ram & Co) for the plaintiff.
Allan Lao (David Allan Sagah & Teng) for the first to third defendants.
Joseph Chioh (State Legal Officer, State Attorney General's Chambers) for the fourth, fifth and seventh defendants.
Sixth defendant absent and unrepresented.

Abdul Aziz Abdul Rahim J:

INTRODUCTION

[1] The dispute between the plaintiff and the first to third defendants is in respect of native customary rights ('NCR') and ownership of a bird's nest cave ('the disputed cave') situate on Bukit Lumut along the Bukit Lumut range in Merirai-Kakus area in the District of Bintulu, Sarawak.

[2] The plaintiff called the disputed cave Lubang Berkat whilst the first to third defendants called it Lubang Peseilu. For the purpose of this judgment, I will refer to the cave as 'the disputed cave'.

[3] The plaintiff said he inherited the disputed cave from his father and who in turn inherited it from his grandfather. In other words, the ownership and rights to the disputed cave was passed down to the plaintiff from his ancestors.

[4] However the plaintiff alleged that the first to third defendants had unlawfully and by using threat of bodily harm and violence to the plaintiff have forced the plaintiff to sign over the ownership and rights over the disputed cave to the first, second and third defendants under two instruments that is the deed of assignment (exh P33) and the statutory declaration (exh P37).

[5] Additionally the plaintiff alleged that the first to third defendants have by letter (exh P60) wrongfully claim to have found the disputed cave in 1995 as being part of the Bendawa caves complex on the Bukit Lumut range.

[6] Therefore the plaintiff claimed against the first to third defendants various declaration, inter alia:

(a) that the plaintiff is entitled to enjoy the NCR and/or rights to extract or harvest edible birds' nests over or from the said 'bird's nest caves' including Lubang Bukit Lumut;

(b) that the plaintiff is the owner of the said 'bird's nest caves' and in particular 'Lubang Bukit Lumut' Ulu Sungai Melirai, Pandan, Bintulu;

(c) that purported 'Pasar Peseilu' cave has never been verified, accepted and or approved by the district office as belonging to the first, second and third defendants;

(d) that the purported 'Pasar Peseilu' cave is in fact the plaintiff's 'Lubang Bukit Lumut';

(e) that the first, second, third, fourth and fifth defendants are precluded from impairing the plaintiff's rights, licence and title in 'Lubang Bukit Lumut';

(f) that the said deed dated 21 August 2001 (exh P33) and the letter dated 20 August 2001 (exh P60) is illegal, void, unenforceable and or contrary to public policy;

(g) that licence to collect/sell edible birds' nests No BC 0750 issued by the fourth defendant to the first, second and third defendants to the extent of covering or adding 'Pasar Peseilu' cave is illegal, void and or improper; and

(h) damages.

[7] In their defence the first to third defendants, contended that they have NCR over the disputed cave. The first to third defendants alleged that the disputed cave is part of Bendawa caves complex to which they have NCR and rights to collect birds' nests. The first to third defendants also alleged that they discovered the disputed cave by accident in 1995 as they travelled far inside the Bendawa caves complex. The first to third defendants contended that they had written to the District Officer of Tatau/Bintulu a letter (exh P60) informing the latter about the discovery.

[8] Additionally, the first to third defendants contended that the plaintiff has vide the deed (exh P33) and the statutory declaration (exh P37) relinquished his rights over the disputed cave to the first to third defendants.

[9] Therefore, the first to third defendants have also filed a counterclaim against the plaintiff seeking similar declarations as sought by the plaintiff on the ownership and rights over the disputed cave. The first to third defendants also claimed damages for trespass and assault.

[10] The plaintiff's claim against the fourth and fifth defendants is premised on the plaintiff's contention that the fourth and fifth defendants have

wrongfully refused to issue bird's nest's licence to the plaintiff to collect birds' nests from the disputed cave because of the disputes between the plaintiff and the first to third defendants.

[11] At this juncture, it is necessary to note that in a parallel development the second defendant had filed a claim over the disputed claim against one Along ak Bangau in a Native Court proceedings (as shown in exhs P42 and P42T). In that Native Court case, the Native Court decided against the second defendant. The second defendant thereafter filed an appeal to the Native Court of Appeal. However before the appeal could be heard Along ak Bangau decided to abandon or relinquish his rights and claim over the disputed cave and gave it to the second defendant. The plaintiff was not a party to the proceedings before the Native Court.

[12] For that reason, the plaintiff has brought in Along ak Bangau as the sixth defendant and the Native Court as a nominal seventh defendant so that the decision of the Native Court could be examined and the disputes between all the parties determined once and for all.

THE PLAINTIFF'S CASE

[13] The plaintiff claimed that he is the owner of, and have rights to harvest birds' nests from the following birds' nests caves inherited from his late father, Ashak bin Lana:

(a) bird's nest cave at Sungai Tajam, Pandan, Bintulu, Sarawak;

(b) bird's nest cave at Batu Belah, Ulu Sungai Melirai, Pandan, Bintulu, Sarawak;

(c) bird's nest cave at Tiang Batu, Ulu Sungai Melirai, Pandan, Bintulu, Sarawak;

(d) bird's nest cave at Lubang Ulu Melirai, Pandan, Bintulu, Sarawak;

(e) bird's nest cave at Lubang Bukit Lumut, Ulu Sungai Melirai, Pandan, Bintulu, Sarawak;

(f) bird's nest cave at Lubang Tupai Belian, Ulu Sungai Melirai, Pandan, Bintulu, Sarawak;

(g) bird's nest cave at Lubang Lesong, Ulu Sungai Melirai, Pandan, Bintulu, Sarawak;

(h) bird's nest cave at Lubang Nunuk, Ulu Sungai Melirai, Pandan, Bintulu, Sarawak;

(i) bird's nest cave at Lubang Kebunyau, Sungai Melirai, Pandan, Bintulu, Sarawak;

(j) bird's nest cave at Batu Lingong, Ulu Sungai Melirai, Pandan, Bintulu, Sarawak;

(k) bird's nest cave at Lubang Lemujan, Ulu Sungai Melirai, Bintulu, Sarawak;

(l) bird's nest cave at Lubang Nulu, Ulu Sungai Melirai, Bintulu, Sarawak; and

(m) bird's nest cave at Lubang Tengili, Ulu Sungai Melirai, Bintulu, Sarawak ('the said caves').

[14] Alternatively, the plaintiff claims that being a Melanau, he has acquired the NCR over the said caves recognised under the Sarawak Land Code and under the common law whereby from the said caves the plaintiff and his ancestors or forefathers had at all times been deriving foods, forest produce, birds' nests and valuable medicines for their livelihood and sustenance.

[15] The plaintiff also averred that the fourth and fifth defendants and or its predecessors recognised the plaintiff's NCR, rights or title and or had encouraged the plaintiff and or his ancestors to acquire such rights and or title to the said caves. The plaintiff has adduced evidence that the predecessors of the fourth and/or fifth defendants had issued the plaintiff's ancestors with the title of ownership of the said caves. In fact the plaintiff had been issued with licence to collect birds' nests from the said caves by the fourth defendant. Records of ownership or rights over the said caves are and were at all material time kept by predecessors of the fourth and fifth defendants, by the District Office Bintulu and by Sarawak Museum.

[16] Additionally, in recognition of the plaintiff's aforesaid rights, the fourth and/or fifth defendants had issued and had continued to issue the plaintiff with a yearly licence to collect edible 'black nest swiftlets' (pursuant to the Wildlife (Edible Birds' Nests) Rules 1998).

[17] The plaintiff alleged that from about October 2000, the first, second and third defendants, their agents or servants had on diverse dates entered without lawful permission or consent and had illegally and unlawfully trespassed into the plaintiff's 'Lubang Bukit Lumut' cave or what the defendants referred to as Lubang Peseilu, Ulu Sungai Melirai, Pandan, Bintulu, Sarawak (ie 'the disputed cave'), and had illegally erected a small hut and thereafter started stealing and extracting birds' nests without control or restriction and without the plaintiff's permission or consent, causing disruption and or disturbance to the plaintiff's said caves, threatening the interest and existence of the said birds, their ecology and or environment, and the rights and licence of the plaintiff. The approximate location of the disputed cave is set out in the map annexed and marked as 'B' and edged in red in the plaintiff's statement of claim.

[18] The plaintiff averred that there is no such 'Pasar Peseilu' cave in existence; but what the first, second and third defendants claimed or believed to be Pasar Peseilu cave is actually the plaintiff's 'Lubang Bukit Lumut' cave.

[19] Against the fourth defendant, the plaintiff alleged that the fourth defendant has wrongly, improperly, arbitrarily and or illegally issued and continue to issue the first, second and third defendants with licence to collect/sell edible birds' nests at the disputed cave.

[20] The plaintiff had referred his complaint or dispute to the Native Court in Tatau, Bintulu and filed his claim against the first, second and third defendants on 29 November 2000. But the plaintiff's case in the Native Court was never determined.

[21] While awaiting the hearing and adjudication of the matter in the Native Court, the second defendant with his agents or servants had approached the plaintiff in or about August 2001, threatening violence on the plaintiff unless the plaintiff surrender his right and acknowledge claim of the first, second and third defendants over the disputed cave by signing an agreement. The plaintiff averred that at the law office of Messrs Sia & Ha Advocates, Bintulu ('the said law office') he was asked to sign (and the plaintiff did sign) a letter dated 20 August 2001 (exh P37), acknowledging the first, second and third defendants' claim to the disputed cave. The plaintiff alleged that the said letter was prepared in advance and was never read nor explained to him. At the said law office also, the plaintiff alleged that he was also forced to sign a deed dated 21 August 2001 with the first, second and third defendants (exh P33), the terms and conditions of which were never read, translated and explained to him. The plaintiff averred that he signed exhs P37 and P33 in fear of his safety.

[22] The plaintiff averred that exhs P37 and P33 are unlawful or voidable and unenforceable and contrary to public policy and does not confer any legal or equitable rights in the disputed cave to the first, second and third defendants.

[23] By reasons of the matters aforesaid, the plaintiff contended that he had sustained irreparable loss and damage and despite repeated demands, the first, second and third defendants have failed to vacate and/or leave the disputed cave which is actually the plaintiff's 'Lubang Bukit Lumut'. Instead the defendants threatened the plaintiff with further violence.

[24] Further, the plaintiff contended that unless restrained by the court, the first, second and third defendants, their servants and/or agents will continue to extract and/or steal the edible birds' nests from the disputed cave, thus

endangering the ecosystem, breeding environment and life of the birds causing irreparable loss and damage and threatening the rights and licence of the plaintiff.

[25] It is also the plaintiff's case that from around October 2000, up to date hereof, the plaintiff has been excluded from his rights to use and enjoy the disputed cave to extract edible birds' nests and thus has suffered loss and damage.

[26] The plaintiff alleged that on or about 16 December 2001, agent or servant of the plaintiff, Mr Jumat ak Igong, had found all the birds' nests from the disputed cave stolen by the second defendant or his agents or servants, seriously harming the breeding, life and environment of the swiftlets.

THE FIRST TO THIRD DEFENDANTS' CASE

[27] In reply to the plaintiff's allegations, the defendants averred that they have acquired the NCR or rights recognised under the Sarawak Land Code (Cap 81) or rights recognised under the Wildlife Protection Ordinance 1998 and the Wildlife (Edible Birds' Nests) Rules 1998 or rights under the common law over the Lobang Bedawa caves complex situated at Ulu Sungai Kakus, Tatau which comprises of five caves, namely Pasar Tungun, Pasar Kakasai, Pasar Danau, Pasar Lubuong and Lubang Peseilu ('the disputed cave').

[28] The defendants contended that it is established that the disputed cave is situated alongside the area of Sg Berkuyat which is located about 20 km away from the plaintiff's Lubang Bukit Lumut (situated near Hulu Sungai Merirai) and to walk from the disputed cave to Lubang Bukit Lumut will take approximately four hours more or less. The defendants claimed that the two caves systems are separated by the Banjaran Lumut mountain range and do not overlap each other.

The first, second and third defendants claimed to have been issued with a purported licence by the fourth defendant to enter the disputed cave and which the defendants purportedly claimed to be 'Pasar Peseilu', to collect the birds' nests

[29] The defendants also averred that the plaintiff and his servants or agents have unlawfully trespassed unto the disputed cave and wrongfully collected birds' nests without the consent of the said defendants or of the fourth defendant.

[30] In further reply to para 7 of the statement of claim, the said defendants contended that the plaintiff is estopped or statute barred from disputing the

said defendants' rights over the Lubang Bedawa caves complex (including the disputed cave) because the plaintiff has failed to comply with the statutory provisions of the Sarawak Land Code (Cap 81) or the Wildlife Protection Ordinance 1998 or Forests Ordinance (Cap 126).

[31] Besides filing their defence against the plaintiff's claim, the defendants also filed a counterclaim against the plaintiff alleging that the said defendants and their employees have been harassed, assaulted and attacked by the plaintiff or his servants or agents on diverse occasions. Eight police reports dated 22 May 2000, 22 June 2000, 26 June 2000, 17 July 2000, 8 December 2000, 5 February 2001, 10 February 2001 and 28 March 2001 respectively have been lodged by the second defendant and his employees with regards to instances of disturbance, assault, threats and trespass by the plaintiff and/or his agents or servants against the second defendant and his employees. The defendants alleged that on one occasion, the left index finger of the second defendant was chopped off by the agent of the plaintiff and the second defendant has also suffered other injuries in the attack.

[32] It was also alleged that the plaintiff and/or his agent has also set fire or attempted to set fire to the said defendants' camp at the disputed cave on or about 22 June 2000. Further, the defendants contended that the plaintiff or his agents have threatened the defendants and their employees with weapons including knives and firearms on several occasions at the disputed cave and elsewhere. The defendants purportedly had to seek the protection of the police and forest rangers at Lubang Peseilu cave. It was alleged that the defendants have to incur expenses to maintain and feed the police personnel or forest rangers stationed at the disputed cave area.

[33] Having regards to the pleaded case by both parties it appears that there are three broad issues before this court. *Firstly*, the exact location of the disputed cave. *Secondly*, who has rightfully inherited the disputed cave. *Thirdly*, whether this court has the jurisdiction to grant the declarations sought and to declare the decision of the Native Court in exhs P42/P42T void.

EXACT LOCATION OF DISPUTED CAVE

[34] The expert evidence of Mr Luke Khiu ('PW3') and Mr Ng Yu Leong ('PW11') in relation to exh P5(1–7) survey report of Bukit Lumut cave entrance (pp 1–7 of bundle E) and exhs P48(1–16) (photographs) and P48N(1–16) (pp 8–13 of bundle E) remained unchallenged and supported the plaintiff's claim that the disputed cave is on Banjaran Bukit Lumut. The first to third defendants have not called any expert to rebut PW3's and PW9's evidence. Even DW6 (Dr Charles Leh) who testified for the defendants cannot determine with precision where this cave is located. In his testimony DW6

admitted he did not take any GPS reading (ie global positioning system) to determine the exact location of the disputed cave. Similarly with DW7 (Mr Oswald Braken Tisen). He also admitted in his testimony that he did not take GPS readings at the disputed cave.

[35] PW3 testified that he prepared exh P5(1–7) together with PW11 using the GPS method. The disputed cave is located in Bukit Lumut, Banjaran Bukit Lumut and not situated on Sg Bekuyat. There is no Bukit Peseilu on the map at p 6 of the report. The disputed cave is situated in the Kakus-Pandan Protected Forest. The disputed cave is not 'Off Bukit Lumut'; it is on Bukit Lumut.

[36] Cross-examined by the defendants' counsel, PW3, he testified exh P5 would be accepted by the Land and Survey Department. Hulu Sg Merirai is to the east of Banjaran Lumut; Sg Bekuyat is on the south of Banjaran Lumut. The cave entrance, on straight line measurement is about 300–400 meters from the nearest point of Sg Bekuyat. The disputed cave is on Bukit Lumut which is part of Banjaran Lumut. It appears that the base camp is very near to Sg Merirai.

[37] In answer to a question by the senior state legal adviser, PW3 testified that he is authorised under ss 104 and 109 of the Sarawak Land Code to carry out the survey.

[38] In re-examination, PW3 testified that his practice was to analyse the information provided by his surveyor and to compile the report and that his surveyor, PW11 is trained to handle the equipments.

[39] PW11 testified that he has 20 years experience as assistant surveyor with survey development services. PW11 prepared a report, exh P5. He confirmed its contents and his signature appears on exh P5 (bundle E at pp 1–18). He testified the map to exh P5 is from Land and Survey Department and only licensed surveyors can purchase the map. According to PW11, the disputed cave is on Banjaran Lumut. It is on Bukit Lumut on Banjaran Lumut. The disputed cave is not in a river. From the map, PW11 testified that he did not see any 'Lubang Peseilu'. He testified the cave shown at p 331 of bundle C is Lubang Bukit Lumut and is the same cave as shown at p 15 of bundle E. PW11 said Banjaran Lumut is the boundary between Tatau and Bintulu; and Sg Bekuyat is about 300 meters from the point marked 'X' which is Lubang Bukit Lumut entrance. Sg Merirai is flowing into Sg Pandan, in the northernly direction and Sg Bekuyat is flowing in the opposite direction of Sg Merirai. In spite of the cross-examination by the defendants' counsel, PW11 maintained that his GPS equipment was functioning properly and that he got proper and

accurate readings of entrance point of the said cave. PW11 said he was authorised by PW3, who is a licensed surveyor to do the survey.

[40] DW3's (Tiun ak Kanun) evidence is that he had gone up to the disputed cave and speaks about 'one single cave entrance' for both Lubang Bedawa and the disputed cave. According to DW3, there was no separate cave entrances for these two caves. But the evidence of DW1 (ie the first defendant) would show, when exh D17(A) was referred to her, and she confirmed that the cave entrance for Lubang Bedawa is different from the cave entrance for the disputed cave. It is plain that DW3's evidence of 'one single cave entrance' for Lubang Bedawa is not true, because Lubang Bukit Lumut/Lubang Peseilu — (the disputed cave) according to DW1 has a separate cave entrance. If truly DW3 had gone up to the disputed cave, he would have known that Lubang Bedawa and the disputed cave or what the defendants call Lubang Peseilu has separate cave entrances.

[41] DW3's evidence also conflicts with PW3 expert evidence, ie exhs P5(1–7) and P48(1–16) (supporting photographs to exh P5) at pp 1–18 of bundle E showing that the disputed cave is located on Banjaran Bukit Lumut. DW3 testified that Bukit Bedawa is separate from Bukit Lumut, which was not the case. It must be remembered that DW3 identified the disputed cave in exh P55(1) (at p 331 of bundle C) and so the identity of the cave is not an issue but only its location. DW3 gave evidence purporting to challenge the expert evidence of PW3 without any basis. It was submitted that expert evidence can only be challenged by another expert and in the present case, the evidence of PW3 remained unchallenged. I agree with this submission. The Court of Appeal of Singapore in *Saeng-Un Udom v Public Prosecutor* [2001] 3 SLR 1 held at p 1:

> When a judge is confronted with expert evidence on a matter which is outside the learning of the court and such evidence is unopposed and is based on sound grounds and supported by basic facts, he is not entitled to reject it and substitute it with his own opinion on the matter.

[42] And the Supreme Court in *Syed Abu Bakar bin Ahmad v Public Prosecutor* [1984] 2 MLJ 19 held at p 23:

> It is settled principle that while it is true that a judge who sits alone is entitled to weigh all the evidence, to put his own magnifying glass to determine the probabilities so to speak and form his own opinion or judgment, it would be erroneous for him to form a conclusion on a matter which could only be properly concluded with the aid of expert evidence.

[43] Further evidence in exhs P20 and P21 in the State Attorney General's Chambers bundle of documents ('bundle T') show clearly that the Forest

Department had issued licence to the plaintiff for the said 13 caves that include the disputed cave but referred to as Lubang Bukit Lumut in the 'Sg Merirai/Kakus' area. The evidence of Encik Nyipa Tinggang ('DPW1') that the walk from Lubang Bedawa entrance upwards to the disputed cave is about one hour through the jungle is also unchallenged. Even DW7 who testified for the defendants agreed with the suggestion by learned counsel for the plaintiff that there are no caves in Sg Merirai but there are caves in Ulu Sg Merirai which is in the Banjaran Bukit Lumut area.

[44] In exh P42T, the translation of the Native Court proceedings between Along Bangau and the second defendant in respect of a claim over the same disputed cave, it was stated by Along Bangau and by his witnesses that the disputed cave is 'tiada berkaitan' and 'jalan masuk ke Lubang tersebut tidak sama dengan jalan masuk Lubang kepunyaan Temuli'. It is pertinent to note that the second defendant ('DW9') never challenged such evidence in the Native Court.

[45] In their amended defence and amended counterclaim, the first to third defendants seem unsure on the exact location of the disputed cave. Paragraphs 3 and 4 thereof fly in the face of their own evidence adduced and in the face of exh P42T. It is observed that in para 3 thereof, the defendants refer to 'Pasar' or 'Pasen' not caves. 'Pasen' or 'Pasar' is a local word which refers to a compartment in a cave. The local word for cave is 'Lubang' or 'Lobang'. The first to third defendants have never shown where they allege a cave to exist at Hulu Sungai Merirai. In the light of all these evidences as to the location of the disputed caves, DW3's evidence was plainly false when he testified that there was no separate cave entrances for the two caves.

[46] On the defendants' evidence, it would appear that the defendants have acquired rights to collect birds' nests from the Bedawa caves complex situate in the Sg Berkuyat area on Banjaran Bukit Lumut. It seems that the defendants claimed that the disputed cave is part of the Bedawa caves complex. This claim is apparent from the testimony of the second defendant when he said in his evidence that as they explored the Bedawa caves system, they came upon the disputed cave by chance. However, other evidences produced at the trial do not support this claim. Instead, the other evidences show the contrary. These other evidences consist of firstly the statement of Along Bangau before the Native Court and his witnesses in a claim over the disputed cave which statement states that the entrance to the disputed cave has nothing to do or has no connection with the caves owned by the second defendant. More telling is that Along Bangau in the Native Court case categorically stated that the disputed caves has no connection with caves belonging to the second defendant. This evidence is independently corroborated by exh P38, a letter written by Dr Charles Leh ('DW6'), the Sarawak Museum curator who was tasked with

conducting a ground survey of the Bedawa caves system in order to assist the Native Court in determining the dispute between Along Bangau and the second defendant. Exhibit P38 was written by DW6 himself on 21 April 1997. In it he states:

> Pihak Muzium pernah membuat inspection ke atas gua baru itu di Berkuyat itu pada 15 hingga 18 Mac 1995 dan didapati bahawa gua ini tidak ada kaitan dengan gua-gua yang didapati dalam Lobang Berdawa seperti yang ada dalam surat Birdsnest Caves 003.

[47] It is therefore obvious that the disputed cave is not part of the Bedawa caves complex. This is further supported by exh P39, which is also a letter written by DW6 on 20 March 1995 which contains the following passages:

> This is to inform you that we (Dr Charles Leh, FR Lau Kiung Wei and field staff of SFO Bintulu) have successfully inspected a new cave in Ulu Berkuyat on 17.3.95 while carrying out normal site surveys.
>
> 2. Ground mapping at the site has indicated that the cave is new and is not connected to any of the existing licenced caves inspected in the area. The cave itself is a short subterranean tunnel of 2–15m in height.
>
> 3. I have suggested to the field staff at site to count the number of swiflets at the tunnel entrance and to collect some nest samples for verification of the species present.

[48] From the above passages in exh P39 it is obvious that DW6 and his team had successfully inspected a new cave ie the disputed cave in Ulu Berkuyat on 17 March 1995 and found that the new cave is not connected to any existing licensed caves in the inspected area.

[49] However in his oral testimony in court, DW6 testified that he was hoping to enter this new cave by trying the subterranean tunnel. But it did not lead him into the cave. He testisfied that he only managed to advance about 40 meters. He also testified that he and his team then could not explore beyond the subterranean tunnel at that time. DW6 also testified that he did not descend into the cave entrance because it is a vertical drop. Further, DW6 testified that the subterranean tunnel that he visited could have been connected to the Bedawa because he did not descend. This is of course an assumption by DW6 and not a fact.

[50] Clearly therefore this oral testimony of DW6 is in contradiction to his statements in exhs P38 and P39. On this ground, learned counsel for the plaintiff submitted that the oral testimony of DW6 supporting the probability that the disputed cave could be part of the Bedawa caves system should be disregarded. I agree entirely with this submission for the following reasons.

[51] Firstly, and as submitted by the plaintiff's counsel, this is the first time in 11–13 years DW6 attempted to contradict his own statement in exhs P38 and P39. This is certainly not permissible under ss 93 and 94 of the Evidence Act 1950 which disallow extrinsic and oral evidence to alter, vary or impeached the contents of a document.

[52] Moreover, to allow the oral testimony of DW6 to stand would prejudice the plaintiff since exhs P42T, D10, P24, DD1 and indirectly even exhs D27A and P63, which are all contemporaneous documentary evidence, are in direct contradictions and should be preferred. On the same reasoning I would say that in the light of contemporaneous statement by DW6 in exhs P38 and P39, the oral testimony of DW6 to show the contrary should be disregarded and so I do.

[53] Furthermore, when DW6 was cross-examined by counsel for the plaintiff, DW6 confirmed unequivocally and repeatedly stood by the contents of his official letters marked exhs P38 and P39. This shows that DW6's in his oral evidence in court was trying to change and alter the contents of exhs P38 and P39 were, to borrow the expression used by learned counsel for the plaintiff, 'cooked-up afterthoughts'. I, therefore, accept the submissions by learned counsel for the plaintiff that exhs P38 and P39 contains the true account that after an 'inspection' and 'ground mapping' was done, the disputed cave is not connected to Lubang Bedawa cave system or caves complex.

[54] It is also observed that in exh P42T, the second defendant had never suggested that the disputed cave is connected with 'Danau'. The second defendant, also had never refuted Along Bangau's case in exhs P42 and P42T that the 'Lubang baru itu tiada berkaitan ...' by trying to show that the disputed cave is connected with 'Lubang Danau'.

[55] There are also ample corroborative evidences to show that the disputed cave which the defendants called 'Lubang Peseilu' is not connected to or form part of the Bedawa cave system. DW7 who has also conducted the survey of the cave system in Ulu Berkuyat and Sg Merirai area has never challenged exh P39. Exhibit D10 (the cave certificate) issued to the the second defendant contains a drawing of the caves layout of the Bedawa caves complex; but it also does not show another separate entrance or a second entrance; neither did it show that the purport entrance of the disputed cave was connected with the Bedawa cave system or that the two entrances are connected. A closer examination of the map or drawing of the caves layout at the back page of exh D10 in the area that is marked as 'Danau' does not show that there is another 'tunnel' connected to 'Danau' and neither did it mention anything about the disputed cave Lubang Peseilu. A comparison between the drawing of the caves that looks like a 'tree' at the back page of exh D10 shows that it is not the same with the aerial view

of the purported caves in exh D17(A) and the maps attached to exh D7. This was also confirmed by DW7 who testified that the two were very different and who admitted that he did not make exhs D17(A) and D7. The maker of exhs D17(A) and D7 was never called to testify on the accuracy of the two exhibits. There was no reason or explanation given why the maker of the two exhibits could not be called to testify on the exhibits. In the circumstances, I agree with the submission by learned counsel for the plaintiff that exhs D17(A) and D7 are hearsay and therefore inadmissible: *Sim Tiew Bee v Public Prosecutor* [1973] 2 MLJ 200 where the Federal Court held that the ship's manifest was inadmissible in evidence without the master or officer responsible for it being called to prove its contents; and as the condition precedent to the reception of the document had not been proved, the document was inadmissible.

[56] DW7 also admitted that he did not take GPS readings at the disputed cave. In the circumstances, it does not lay in the mouth of DW7 to state that the disputed cave is located on Bukit Berkuyat.

[57] On the other hand, exh P5(1–7) tendered by PW3 shows that the base camp is at Hulu Sg Merirai. In his conclusion, PW3 stated that 'As can be seen on the accompanying map, the plotted position of the Bukit Lumut cave clearly shows the cave to be located within the Banjaran Lumut (Lumut Range)'. Exhibits P20 and P21 that came from the State Attorney General's Chambers bundle of documents (bundle T) also show clearly that the Forest Department had issued licence to the plaintiff for 13 caves that include Lubang Bukit Lumut (which the defendants called Lubang Peseilu — the disputed cave) in the 'Sg Merirai/Kakus' area.

[58] Both exhs D10 and D17(A) therefore cannot be right and there is no explanation how they both could be right. In such circumstance, the court may either accept exh D10 drawings as correct or accept exh D17(A) drawing as correct but not both in the absence of any explanation why there is such vast and glaring difference in them. The court may accept one which bears the support of, or corroborate by other contemporaneous documents. In my opinion the preponderance of documentary exhibit ie exh P24 would suggest that the drawings attached to exh D7 and the drawing of exh D17(A) ought to be rejected. For exh D17(A) to be accepted it was important for the first to third defendants to call the maker of exh D17(A) and those drawings attached to exh D7, so that he could be queried if those drawings were 'complete' drawings or were they only 'part' drawings of the Bedawa chamber. The words of DW7 cannot be taken as the gospel truth as to the accuracy of exh D17(A). Inspite of having stated clearly that he respected the decision of the Native Courts, DW7 went on to issue the first to third defendants exh D18, the licence to collect birds' nests. Any honest and reasonable man would query the basis of exh D18 especially when on being aware of exh P42T, had even gone on to issue exh P26

to cancel licence. The explanation given by DW7 for this is, he was not aware of the dispute between the second defendant and Along Bangau as recorded in exhs P42 and P42T and he also did not understand the document. This explanation is unacceptable. DW7 was indeed aware of exh P42T and had even issued exh P26 to cancel the licence of the first to third defendants. By saying 'I don't know', DW7 was either concealing what he actually knew, was lying or had taken a Nelsonian approach. Either way, DW7 was biased in favour of the first to third defendants. This seem to be so because even in the light of exhs P42T and P26, DW7 went on to issue exh D18 without getting any verification from the community leaders in the area whether the first to third defendants were really entitled to the right to collect birds' nests from the disputed cave. DW7 admitted to having officially received exh P39 but did not challenge it and did not write back to DW6 to refute exh P39 that clashed with D7. The significance of exh P39 issued by DW6 cannot be disregarded because DW7 admitted that it was received by the Forest Department and DW7 had not challenged exh P39 at all.

[59] DW7 admitted that he did not go to Sg Merirai to check if another cave exists there. When cross-examined, DW7 testified that he did not verify from the community leaders of Tatau and Bintulu area as to the exact name of the cave and he also did not verify from the community leaders whether this disputed cave is owned by third party other than the second defendant and Along ak Bangau.

[60] DW7 also has never seen exh P15 that shows the disputed cave is situated at Ulu Sg Merirai owned by Bila bin Julai, the plaintiff's grand uncle. DW7 admitted that in year 2000, the Forest Department had received exh P39 but when DW7 wrote exhs D5 and D22 to the Ketua Polis Daerah Tatau, DW7 concealed the existence of exh P39. DW7 did not extend exh P39 to the police. Under intense cross-examination, DW7 agreed that there are no caves in Sg Merirai but the caves are in Ulu Sg Merirai which is the Bukit Lumut area. He also agreed that in exh D17(A) at the circle marked 'E' and circle marked 'D' and its corresponding area would show that there are separate compartments. DW7 agreed that his Forest Department was not in charge for determining customary right to collect birds' nests from the disputed cave.

[61] Then there is the unchallenged evidence of DPW1 who testified that he saw the 'ground map' by DW6, which showed that the disputed cave was not connected with Bedawa caves complex. Learned counsel for the defendants did not challenge DPW1 on the the existence of the 'ground map' referred to in exh P39. This exhibit was prepared by DW6 and the latter in his oral testimony has attempted to show that the new found cave which is disputed is part of the Bedawa caves system belonging to the defendants. But DW6 or the defendants did not produce the ground mapping referred to in his document in exh P39;

as such adverse inference ought to be drawn against the first to third defendants under s 114(g) of the Evidence Act 1950 that had this 'ground mapping' referred to in exhs P39 and P38 been produced, it would have been unfavourable to the case of the first to third defendants.

[62] In para 2 of exh P38 it is clearly stated that '[D]alam surat itu terdapat lukisan pasar-pasar dalam Lubang Bedawa dan ia tidak mempunyai sebarang gua yang diberi nama Peseilu'. DPW1's testimony that edible birds' nests and swiflets were found at the entrance of the disputed cave, is supported by exhs P55(1) to P55(12), the photographs taken by the plaintiff showing birds' nests and swiftlets at the entrance and inside the disputed cave. These photographs support the truth of the contents of exhs P38 and P39.

[63] The evidence of George ak Dong (at p 3 of exhs P42T and in P42) who testified before the Native Court in the Native Court case that the '... Lubang tersebut (ie the disputed cave) adalah Lubang baru yang kami temui dan jalan masuk ke Lubang tersebut tidak sama dengan jalan masuk Lubang kepunyaan Temuli' was never refuted by the second defendant, before the Native Court. In the same Native Court case, George ak Dong and one Samun ak Anyut also testified that the second defendant, had never previously collected birds' nests from the disputed cave. Their testimonies on this point can be found in the notes of proceedings in exh P42 and its translation exh P42T. It is pertinent to note that both George ak Dong and Samun ak Anyut were former workers and were 'cousins' of the second defendant. The second defendant also had never testified in exh P42T that the new Lubang was 'dug' by Along Bangau ('the sixth defendant') and that it was connected with Lubang Bedawa or Lubang Danau. In fact, in exh P42T, the second defendant had himself testified before the Native Court that: 'Saya tahu bahawa terdapat Lubang baru di kawasan itu berdasarkan surat yang saya periksa di Muzium, tetapi ianya bukan Lubang baru tetapi Lubang lama di kawasan tersebut.' The second defendant never said in exh P42T that he had acquired the new cave long ago and that the new cave is connected with Danau.

[64] The cumulative effect of all these evidence documentary or otherwise is that it proves on the balance of probability that the disputed cave is never part of the Bedawa caves complex, of which the defendants had been issued with licence to collect birds' nests. It also shows that the second defendant or any other defendants for that matter never established any rights to collect birds' nests from the disputed caves.

THE PLAINTIFF, THE RIGHTFUL HEIR TO THE DISPUTED CAVE

[65] From the records obtained by the plaintiff from the District Office in Tatau, Bintulu, it was shown up to 1995, the first, second and third defendants

never had any previously recognised or established rights in any purported cave called 'Pasar Peseilu'. On the evidence by the plaintiff, the first, second and third defendants only has previously established rights in four caves namely: (i) Pasar Tugun; (ii) Pasar Kakasai; (iii) Pasar Danau; and (iv) Pasar Lobuong. This evidence is found in a letter dated 12 May 1993 (Lesen Untuk Memungut Sarang Burung No MU/430/L93/TATAU/001) and 28 February 1995 (Ref No:MU/430/A/3/(38)) from Sarawak Museum.

[66] The plaintiff averred that by letter dated 4 December 2001, the District Office, Tatau Bintulu, made it plainly clear that the said office have never verified, nor approved the purported 'Pasar Peseilu', the disputed cave.

[67] PW1 was the *temenggung* for the Malay and Melanau community in the whole of Bintulu area, which includes Tatau district. This fact was not challenged. PW1 testified that he knew Bila bin Julai who was also known as Bila ak Julai, who is PW1's uncle. During Japanese occupation, PW1 stayed with Bila. Bila is a Penan and PW1's cousin married Bila's nephew — Idris bin Rudang. A 'family tree' of Bila was shown to PW1 who confirmed the family tree. PW1 further testified that Asahak bin Lana is the son of Nuri bt Julai, sister of Bila and Jaya bin Asahak (the plaintiff) is the son of Asahak bin Lana. PW1 testified that Bila bin Julai came from Kampung Berasap-Pandan. PW1 confirmed the contents of pp 9–13 of bundle F, tendered as exh P1. PW1 testified he signed exh P1 and that all information contained in exh P1 are within his personal knowledge. PW1 also testified that Penghulu Hamzah bin Kria had passed away.

[68] In exh P1, it is stated clearly (p 9) that the 'Ownership of the caves are derived from by virtue of customary inheritance practice as more particularly described here in below ...'. All the birds' nests caves are located at Banjaran Bukit Lumut. Bukit Lumut is in the area of Merirai-Kakus. PW1 testified he had gone up Bukit Lumut in 1941 during Japanese occupation. PW1 testified that Bukit Lumut is situated between Tatau district and Bintulu district within the Bintulu division.

[69] PW1 confirmed that photographs at p 331 of bundle C (exhs P55(1) and P55(2)) and p 15 of bundle E (bottom) as Gua Lubang Bukit Lumut. PW1 testified that Bila harvested birds' nests from Gua Lubang Bukit Lumut and the other caves mentioned in exh P1. PW1 testified that caves No 1, 3, 5, 6, 7, 8 and 9 were originally owned by Bila and caves No 2, 4 and 10 were acquired through government auction during the Raja Brookes times; PW1 testified that he was familiar with the Sg Bekuyat area and has never heard about Gua Lubang Peseilu. To PW1's knowledge Gua Peseilu does not exist.

[70] Under cross-examination, PW1 testified that he got the information in exh P1 from the district officer and the District Office of Bintulu. PW1 testified he signed exh P1 at the district office and before he signed exh P1, he did verify the information contained in exh P1. As far as he can remember, PW1 said he was briefed by the district officer. PW1 testified that he has been to all the caves listed in exh P1 schedule; the last time in 1984. All the caves listed are located in Sg Merirai area in the sub-district of Sebauh. PW1 testified Sg Bekuyat-Kakus is predominantly a Penan area. PW1 testified that after 1967, he had gone to Gua Bukit Lumut following those who inherited the caves to assist collecting birds' nests.

[71] PW1 testified that Bila ak Julai was a Penan and in 1941, PW1 stayed with Bila at Kampung Berasap-Pandan, which was a permanent place. The Penan have their own customs and customary laws. The fact that Bila owned Lubang Gua Bukit Lumut was known to PW1, *temenggung* personally and supported by documents. PW1 has seen the original certificates mentioned in exh P1. PW1 had communicated with the district officer and shown the originals by the staff. PW1 agreed that certificate in exh P1 only confer rights to collect birds' nests at specified caves. PW1 testified that by way of custom, the Penan can own caves. The custom is, the first Penan to locate a cave can claim ownership to it. This *adat* is applicable to natives.

[72] PW1 confirmed in re-examination that exh P1 was prepared by the District Officer of Bintulu. Before PW1 put his signature on exh P1, he consulted the district officer and verified the facts in exh P1 and PW1 did check the files of the district office. Asahak bin Lana was a Melanau and after he died, Jaya bin Asahak inherited the caves.

[73] PW1 came to know about the *adat* from his elders; and the Melanau also gives rights to ownership of caves and rights to collect birds' nests. Only the plaintiff inherited the caves. This was because the other heirs were only 'waris tumpang' based on 'belas kasihan' had relinquished/given their rights and authorised the plaintiff, who was the 'waris tunggal' to manage the caves.

[74] PW1's evidence was crucial. PW1 had personal knowledge of the cave rights by Bila bin Julai, passed down to Asahak bin Lana and thereafter to the plaintiff. Those parts of PW1's evidence remain unchallenged based on PW1's personal knowledge. He also testified that he presided on the Chief Superior Native Court and confirmed that 'adat' Melanau gave rights to ownership and rights to collect birds' nests.

[75] Section 4(b), 4(2) and (3) of the Native Courts Ordinance 1992, provide that 'any person' who in the opinion of the resident is versed in the native system of personal law of the relevant community (in PW1's case —

Melanau customs and *adat*), may be appointed to preside over a Native Court. In the circumstances, it was submitted that PW1 is taken to be well-versed with the Melanau customary laws unless shown otherwise and the court should not ignore his evidence, especially when they are based on his personal knowledge and even the Forest Department Senior Officer ('PW6') testified that the licence issued is in recognition of ownership rights and rights to collect birds' nests from the caves. The defence have failed to show that PW1 was not versed with Melanau customary laws.

[76] PW1's evidence about ownership rights of the caves by Bila bin Julai was largely unchallenged. Exhibit P1 has to be given proper weight, especially when it was prepared well before the 'dispute' and corroborated by exhs P47, P49, P50, P17, P13A, P15 and by exhs P6 and P8 (which are all 1954 official documents and Memorandum of District Officer Bintulu) because PW1 testified that the contents of exh P1 was verified by him and from documents in the district office, corroborated by other documentary evidence tendered by other witnesses.

[77] In *Sagong bin Tasi & Ors v Kerajaan Negeri Selangor & Ors* [2002] 2 MLJ 591, His Lordship Justice Mohd Noor Ahmad held:

> In principle, oral histories of the aboriginal societies relating to their practices, customs and traditions and on their relationship with land should be admitted subject to the confined of the Evidence Act 1950, in particular s 32(d) and (e), that is to say: (i) they must be of public or general nature or of public or general interest; (ii) the statement must be made by a competent person, ie one who 'would have been likely to be aware' of the existence of the right, customs or matter; and (iii) the statement must be made before the controversy as to the right, customs or matter had arisen.

[78] PW2 (Mr Wilfred Jolly) testified that he was the District Officer of Bintulu from June 1991 to end of December 1996, covering Bintulu district and Sebauh sub-district. In relation to PW1's evidence that he verified the facts in exh P1 — which was prepared by the district office — but PW2 could not recall having prepared exh P1.

[79] There was no reason for PW1 to lie about exh P1 or to falsely create exh P1 as exhs P47, P6, P8, P49, P50, P10/P10A produced from the files of the district office which strongly and independently supports the fact that Bila ak Julai had ownership or 'sole property' rights to the caves in question.

[80] The creation of NCR is only prior to 1 January 1958. Exhibit P2T would show that there existed old custom of collecting birds' nests and by exhs P2/P2T, PW2 notified the folks of Rumah Bilong that it is prohibited to

'search for new caves' in the Kakus and Maing river, which covers Sg Bekuyat because it is a tributary of Sg Kakus. Bila came from Kampung Berasap-Pandan. Exhibit P4 was copied to Tua Rumah Berasap Pandan, evidence of the fact that people from Rumah Keseng and Rumah Berasap collected birds' nests — exh P4 was dated 11 August 1955. PW1's testimony that 'Bila bin Julai came from Kampung Berasap-Pandan' remained unchallenged. DPW1's evidence that the plaintiff came from Kampung Berasap-Pandan also not challenged. PW2 confirmed that NCR could be created if natives clear virgin jungle, collect forest produce, use the land as burial ground and collect birds' nests.

[81] PW2 also testified no new rights can be established over caves after 1 December 1958 and that NCR cannot be transferred to third parties who are not heir of the NCR. Such rights only pass down to family members.

[82] PW2 also confirmed in his testimony that the Penan has the right to collect birds' nests.

[83] PW4 (Mr Ambrose Lamit Danggat) was the Sarawak Administrative Officer of Sebauh District Office in Bintulu at the material times and has made photocopies of documents at pp 10–17 and pp 19–26 of bundle C and gave them to the plaintiff. PW4 testified that he obtained the documents from the file in District Office Bintulu. PW4 testified he had these documents at his office in Sebauh at that time. According to PW4, these documents are all genuine copies of documents in Sebauh District Office files from which PW4 made the photocopies, the files were in PW4's custody. PW4 confirmed that pp 10, 11, 12, 13, 19 – 21 of exh P11A (bundle C) were genuine copies made by himself from the original which PW4 has seen and gave to PW14. Pages 27–28 of bundle C were tendered as exhs P13 and P14 respectively. They were based on the certification by Tuai Kampung Ahmad bin Benyit.

[84] PW5 (Mohamed Ansari bin Mohamad Syed Ahmad) was the Sarawak Administrative Officer of District Office Bintulu from 1994 to 26 May 2001. PW5 tendered exh P15 the cave licence at p 14 of bundle T and testified that he checked the office files and found a letters of administration ('LA') and other documents which he cannot remember. PW5 also testified that he has seen the last will and testament of Asahak bin Lana (exh P11A).

[85] Under cross-examination, PW5 testified that plaintiff needed certification for Lubang Bukit Lumut; and PW5 will assess the application first before he can consider the application for the licence. PW5 eventually issued exh P15 based on the files he has and seen documents.

[86] PW6 is a Senior Assistant Director of Forest. Previously PW6 was the Head of National Park and Wild Life Division of the Forest Department from 1994–2001. One of his duties was to licence wild life matters. PW6 confirmed that anyone who wanted to apply for licence to collect birds' nests must be local people of the area and the *tuai rumah* or *penghulu* must verify that the person is a local of that area. Then the district office will have to endorse the application that the applicant is a local as verified by the *tuai rumah* or *penghulu*. Only thereafter will PW6 process the application. The *penghulu* or *tuai rumah* has to verify that the person has the rights to collect birds' nests. These are the procedures for the application for licence to collect birds' nests. PW6 confirmed the procedures under the Forest Ordinance (Cap 126) that had been revised. Prior to the Forest Department taking over the issuance of licence, the Sarawak Museum issued licences to collect birds' nests. PW6 testified that he has seen of cave ownership certificates issued during Rajah Brookes times' photocopies. One of these is exh P17 (at pp 41–42 of bundle C) with 13 caves mentioned therein, and one of which is Lubang Bukit Lumut.

[87] PW6 tendered exhs P17, P18, P19, P20 and P21/P21(a) (at pp 18, 21, 23, 25 & 25A of bundle I). These were the licences PW6 issued to the plaintiff. PW6 confirmed that the licences issued to the plaintiff were for the Sg Merirai-Kakus area, which is within the Kakus-Pandan Protected Forest. It was submitted that exhs P20 and P21 issued by PW6 to the plaintiff recognised the plaintiff's rights to the 13 caves pleaded in his statement of claim which are within the Sg Merirai-Kakus area. PW6 testified that Kakus is under Tatau administration jurisdiction and part of Merirai is under Sebauh administration jurisdiction.

[88] PW6 testified that he has seen p 58 of bundle C in his office file, which was eventually tendered as exh P22. PW6 confirmed that based on exh P22, the Forest Department cannot issue a licence to collect birds' nests from Lubang Peseilu, the disputed cave. PW6 explained that when exh P24 is compared with exh P25, the first to third defendants do not have rights to collect from the disputed cave. This is because only four caves were specified in the first to third defendants' licence. PW6 testified clearly that 'Forest Department cannot issue a licence to the first to third defendants to collect birds' nests from the disputed cave Lubang Peseilu'. It is to be noted that the caves mentioned in exh P17 (the plaintiff's licence for 13 caves) and in exh P24 (the first to third defendants' licence to the four Pasar) are all located in Kakus-Pandan Protected Forest.

[89] PW6 further testified that exh D1 at pp 8–9 of bundle G was signed in 1995; and that based on the Native Court case (exh P42), his department decided to cancel the licence given to the first to third defendants.

[90] PW6 tendered exh P28 and testified that licence to collect birds' nests is not transferable. PW6 confirmed that his department received exh P29. PW6 tendered exh P32 to show a Native Court case was indeed filed by the plaintiff against the first to third defendants and that '... the reissuing of licence for the cave will be based on the decision of the Chief Native Court'.

[91] PW6 testified that his department still issues licence to the plaintiff which covers Lubang Bukit Lumut and that his department will issue licence to those who already established their right to birds' nests caves which must be endorsed either by *tuai rumah*, *penghulu*, *pemanca* or *temenggung* and by the district officer who has jurisdiction over the area. In our present case, PW1 (Temenggung Hj Yusof), being the Temenggung of Melanau community and who presided over Chief Superior Native Court had testified that from his personal knowledge, the plaintiff had ownership rights to the 13 caves in question inherited from Bila bin Julai who is related to PW1.

[92] PW6 testified clearly that his department will not consider exh P33 because all this while the licence is not transferable.

[93] Additionally, the State Attorney General's Chambers had agreed to the existence and contents of exh P17 as in their letter dated 12 July 2002 and also as conceded by learned counsel for the State Attorney General's Chambers, Mr Thomas Akin. On 14 October 2005, PW6 knew that the licence in respect of the disputed cave Lubang Peseilu was suspended. PW6 received exhs P34 and P35 but his department refused to give the documents requested. PW6 confirmed that his department did not carry out a survey to determine whether Lubang Bukit Lumut and Lubang Peseilu are two different caves. But the department did do a survey of the disputed cave Lubang Peseilu but no photographs were taken. PW6 testified that there is no certification by his department on the disputed cave Lubang Peseilu and his department will not issue licence. PW6 further testified that the department staff never went to the ground to check the exact location of Lubang Bukit Lumut.

[94] PW6 testified that Along ak Bangau was successful in a Native Court case against the second defendant. Penghulu Maggai who presided over the Native Court made a decision that the disputed cave Lubang Peseilu did not belong to the first to third defendants. Then DW7 wrote exh P26 suspending the first to third defendants' licence to the disputed cave Lubang Peseilu. PW6 testified that his department did not take any step to verify the finding of Penghulu Maggai. PW6 could not explain and did not know why the disputed cave Lubang Peseilu was included in exh D16 inspite of exh P26. PW6 did not know if exh D16 was properly issued. PW6 testified that if he had seen the insertion in exh D16 adding the disputed cave Lubang Peseilu, he would not have signed exh D16.

[95] PW6 also testified that the disputed cave should not be included in exh D16 because it has not been established. The report by DW7 says there is no Lubang Peseilu. There is no mention of the disputed cave Lubang Peseilu in exh D7. Further, the drawings attached to exh D7 had not been tendered through the maker and ought to be rejected.

[96] PW6 testified that he could not confirm whether the proper procedure had been complied with in the issuance of exh D17 because PW6 was not consulted by his deputy. PW6 testified clearly that he did not know whether exh D17 was properly issued or not. PW6 did not know whether the insertion/amendment to IDD18A was done properly.

[97] PW6 further testified that there is some foul play and all the licences after year 2000 was signed by his deputy and in one of the licences (exh D16) which PW6 signed, his deputy had inserted the disputed cave Lubang Peseilu and then initialled it. And that was the only licence signed by him. Exhibit D16 was referred to PW6 and he testified that he suspected some foul play in the issuance of the licence in exh D16. PW6 also disagreed that exh D7 confirmed that the first to third defendants have right to the disputed cave Lubang Peseilu. It is pertinent to remember that no new rights of whatsoever nature or NCR could be created over the purported Lubang Peseilu, the disputed cave, after 1 January 1958 because of s 5 of the Sarawak Land Code which prohibits any claim on NCR after 1 January 1958. DW10 after having seen exhs D27A and P63 stated clearly that the first to third defendants cannot claim the disputed cave. The first to third defendants also lost the battle for the disputed cave in Native Court Case No CC/CIV/96/6 with Along Bangau (see exh P42T — judgment of Penghulu Maggai) — and are accordingly estopped or barred by res judicata from claiming such rights.

[98] The evidence also shows that the first to third defendants have no certification from their local headman to support such purported claim to the disputed cave in 1995. In accordance with exh P24, the first to third defendants only have rights to four 'Pasar in Lubang Bedawa — not four 'Lubangs'. There should be a clear distinction drawn between a 'Pasar', which means a compartment in a cave and 'Lubang', which is the cave itself. By exh P24, the first to third defendants do not own the said Lubang Bedawa but have rights to collect birds' nests from the four 'Pasar' or compartments in the whole system in the said Lubang. Therefore it was submitted that even the Lubang Bedawa does not belong to the first to third defendants, much less the ownership over the disputed cave Lubang Peseilu.

[99] Exhibits P1 (certification by the senior community leaders well before the 'dispute' arose), read with exhs P8, P10, P10(A), P10(B), P11A, P13, P13A, P14, P15, P20 and P21 (the 13 caves listed in the licences), P45, P46,

P46(A), P47 (a 1954 document of authentic record kept by district office), P49, P50, P52 (the birth certificate of the plaintiff to show Asahak Lana was his father), P62 and even D25 and D25A are directly relevant to show the trail of inheritance by the plaintiff who was the sole heir of the 13 caves with certain 'waris tumpang'. PW9's evidence that the 'caves' had been distributed is corroborated by exh P11A (the last will and testament of Asahak bin Lana) and independently by exh P17. The senior state legal officer for the State Attorney General's Chambers accepted this evidence and its contents and did not challenge it. Therefore, it was submitted that the plaintiff had made out more than a prima facie case that the so-called Lubang Peseilu the disputed cave by the defendants is in fact Lubang Bukit Lumut situated on the Ulu Sg Merirai river system on the Banjaran Bukit Lumut. Moreover, PW6 in his own letter, exh P28, at third para has stated:

> Untuk makluman, bahawa Bahagian Taman Negara dan Hidupan Liar, Kuching tidak akan mengeluar/melulus lesen-lesen baru untuk memungut sarang burung.

[100] The first to third defendants' claim of purportedly acquired rights to the disputed cave is doubtful and not supported by evidence. The evidence relied on by the defendants is that the disputed cave was only discovered by chance for the first time 'since 1995'. If that is so, and I think on the evidence adduced before me it is so, then the claim goes against s 5 of the Sarawak Land Code. To this extent even the decision of the Native Court in exh P42T is void. None of the parties in exh P42T had established any rights of whatsoever nature before 1 January 1958 and even the Native Court did not inquire if the parties or the sixth defendant had acquired the NCR or rights to the disputed cave well before 1958. In fact, exh P42T would show that both parties for the first time discovered the cave in 1995. In exh P42T (first page), it is plainly shown that the sixth defendant had used the words 'Setelah penemuan sarang tersebut ditemui saya, saya terus berhubung dengan pihak Muzium ...' and 'Saya ada memberitahu Temuli', which showed beyond doubt and when read with exh D27A (the second defendant's letter of 1995) and exh P63 (the first defendant's affidavit) that both parties to exh P42T had no rights at all to the disputed cave as they both had not established any rights whatsoever acquired before January 1958. Consequently, the Native Court's decision to allow the sixth defendant to win the disputed cave in 1997 for its purported discovery in 1995 without addressing the statutory prohibition in s 5 of the Sarawak Land Code was plainly without jurisdiction and void.

[101] Further, the testimony of DW2 (Kupa Kanyan) under cross-examination is that based on D27A at p 4 of bundle T, Lubang Peseilu was discovered by the first and second defendants only in 1995. DW3, when referred to an affidavit by the defendants, agreed that before 1995, the first,

second and third defendants never found the cave, Gua Peseilu and they have no claim whatsoever on the disputed cave.

[102] It is pertinent to notice here that even DW10 whom the first to third defendants called gave evidence testified that the claims of the first to third defendants looked doubtful and that the first to third defendants cannot have customary rights in the disputed cave.

[103] Thus, it was submitted for the plaintiff that it is plain that the first to third defendants have presented a false claim over the disputed cave since 1995. Consequentially, it was further submitted for the plaintiff that the decision of the Native Court in exhs P42T/P42 ought not to be allowed to stand and ought to be declared void.

[104] PW14, the plaintiff, is a pensioner aged 51. The plaintiff testified he previously lived at 331, Desa Damai Bintulu having left Bintulu because of threat pertaining to the birds' nest caves, an issue in the present case. He was born to Asahak bin Lana and Salama bt Leh (f). The plaintiff testified that he is of Melanau Penan descendant, originated from Kampung Berasap-Pandan. The residents are Punan, Penan and Melanau due to mixed marriages. The plaintiff testified his grandfather is Lana, and did not know the name of his great grandfather. The plaintiff testified that Bila (grand uncle) is the brother to the plaintiff's grandmother. Bila has six brothers and sisters, Sunam bin Julai, Lembu bin Julai, Imam bin Julai, Kilong bin Julai, Rudang bin Julai and Nuri bt Julai. Nuri bt Julai is his grandmother and the youngest sister to Bila bin Julai. Bila bin Julai was not married and Lana was the husband of Nuri bt Julai — their children Asahak bin Lana, Johari bin Lana and Chee bt Lana. Rudang bin Julai has one child — Idris bin Rudang who has passed away. The plaintiff testified he saw Idris bin Rudang passed away. Asahak bin Lana's children are Hj Mohidin bin Asahak, the plaintiff himself and adopted sister Misnah bt Asahak. Bila bin Julai came from Kg Berasap Pandan. Exhibit P4 is dated 11 August 1955 was copied to Tua Rumah Berasap, Pandan, which shows clearly that Rumah Berasap is called Rumah Berasap, Pandan. Exhibit P8, official memorandum dated 25 January 1954, shows that birds' nests caves are documented to be located at Sg Pandan and not at Sg Bekuyat.

[105] Referring to exh P1, the plaintiff stated that the family tree is certified by Pemanca Bahagian Bintulu — Hj Yusuf bin Mahmud (Temenggung of Bintulu). Exhibit P1 is verified by District Office Bintulu with Pemanca Hj Yusuf and Penghulu Hamzah Kria. Both *pemanca* and *penghulu* signed exh P1 and to certify the cave ownership by the plaintiff.

[106] The plaintiff testified that all the persons in the family tree, exh P1, gave the authority and unanimously surrendered the rights to the plaintiff to

manage the caves, the proceeds were shared according to their terms and customs inherited from their forefathers, *adat* Penan and Melanau. The plaintiff testified that Idris bin Rudang had property during his lifetime, ie the birds' nest caves in Ulu Pandan-Merirai Kakus area. Idris bin Rudang distributed these caves (p 4 of exh P1) to the plaintiff's father. The plaintiff testified that he has 13 caves, situated in Ulu Merirai Pandan-Kakus. The plaintiff stated that he has customary rights over the caves and also legal rights. These rights are derived from certificates issued by the Rajah. The plaintiff testified that he inherited the caves from his father who inherited from his grandfather, Bila bin Julai. The caves are situated in the Pandan-Merirai Kakus Protected Forest. The plaintiff testified that Lubang Bukit Lumut was inherited from his father and grandfather. The plaintiff's father passed away in 1993.

[107] The plaintiff stated that he saw Idris bin Rudang passed away and was buried at Muslim cemetary, Kampung Pandan. The plaintiff testified that he obtained exhs P6–P9 from Ambrose Danggat ('PW4') and that he saw the originals in the file of PW4. Exhibits P6–P9 dates from 1954–1983. The plaintiff testified that Bila bin Julai acquired the rights over the 13 caves from the Rajah. During the Rajah times Bila bin Julai stayed around the caves area and harvested the birds' nests from the caves for own consumption and for sale to support his family. This is the life style and *adat* of Penan.

[108] Bila also acquired the caves from an auction. There was a cave's dispute between Ketua Kampung Berasap and Bila bin Julai. The dispute was never determined and so the Rajah took the disputed caves and put it up for auction. Bila was able to buy the caves. It was submitted that exhs P1, P6, P8, P10A, P10B, P11A, P47, P49, P50 and P62 constitute sufficient 'proof' of rights acquired, founded and established by Bila bin Julai over the caves listed and such rights were recognised by the fourth and fifth defendants by issuing licence to the plaintiff as evident in exhs P13, P13A, P14, P17, P21 and P21A. Consistent with the oral evidence of the plaintiff and with exhs D23, D23A, D24, D24A, D25 and D25A — the plaintiff became the sole heir; the other heir divested their rights solely to the plaintiff. The plaintiff further testified that his father had followed his grandfather to the caves. Such trips to the caves were to collect birds' nests, fishing and sometime hunting and also work on the *padi* fields. Bila bin Julai passed away in 1967 at the plaintiff's father house and the plaintiff's father continued to go to the caves even after the death of Bila. Bila bin Julai owned the caves since 1930–1940. Asahak worked with Bila bin Julai about 30–40 years.

[109] The plaintiff testified that Bila had customary rights over the caves and was issued certificates by the Rajah. These rights was passed on to the plaintiff as heir. The plaintiff further testified that his licence to the 13 caves were revoked by the Forest Department and his understanding is that the licence

confirms the ownership to the caves. The plaintiff said that PW1 and a worker, Mering, did go to the caves. The plaintiff testified that he knew the way to the caves since young. The plaintiff thereafter identified Lubang Bukit Lumut from the photographs in exhs P55(1)–(12) and its negatives were tendered as exhs P55N (1)–(12). The plaintiff testified that the plaintiff disputed cave Lubang Bukit Lumut was trespassed and the first to third defendants called it Lubang Peseilu, which never exist. The plaintiff testified that according to exh D27A/ID27, the first defendant started to claim the disputed cave in 1995. The plaintiff testified that Bukit Lumut is situated in Kakus Pandan Forest Reserve, within the Kakus Pandan Protected Forest. When referred to exh P24, the plaintiff testified that the first to third defendants have four Pasen and there is no Lubang Peseilu or Lubang Bukit Lumut, the disputed cave listed in exh P24. The term 'Pasen' or 'Pasar', the plaintiff explained was where the birds' nests were found in the caves. In any one cave, there maybe several pasen. 'Lubang' means entrance to a cave. The plaintiff testified that Gua Peseilu and Gua Berkat is Lubang Bukit Lumut and the cave belonged to the plaintiff's grandfather, Bila.

[110] The plaintiff testified that the first to third defendants were issued licence for the cave because they misled the Forest Department. Even DPW1 confirmed that he was misled by the second defendant until about year 2000 when he unilaterally issued exh P67 to inform the world at large that he no longer worked for the second defendant. The plaintiff testified that the entrance to Lubang Bukit Lumut, the disputed cave and Lubang Bedawa are different. Lubang Bedawa is located below Lubang Bukit Lumut, the disputed cave entrance and it takes 40 minutes to walk from Lubang Bedawa to the disputed cave. Lubang Bedawa is near Sg Bekuyat and is 20 minutes walk from Sg Bekuyat.

[111] The plaintiff confirmed that he filed the Native Court proceedings (exh P31). In August 2001 when the plaintiff was at Lot 331 Desa Damai, Bintulu, Jalan Seaview, the second defendant, together with his brother-in-law Tiun ak Kanun and two others with four unknowns Chinese men had come to the plaintiff's house and threatened the plaintiff that they will take the plaintiff to the jungle, beat him to death. The plaintiff testified that the threats were over his birds' nests cave rights in the disputed cave and the second defendant wanted him to relinquish his rights. The plaintiff's wife, Chandayani was at home at that time, both the plaintiff and his wife were terrified. The plaintiff testified that he was taken to a law firm, Messrs Sia & Co, Advocates, Bintulu, where he was forced to sign a document to renounce his rights over the birds' nests cave — Lubang Bukit Lumut. The second defendant, Tiun and the first defendant were at the said law firm.

[112] The plaintiff testified that he had signed three documents before lawyer Sia but he never gave instructions to lawyer Sia to prepare the documents and the documents were not explained to him. The plaintiff testified that para C and paras 1 and 2 of exh P33 is not true; he had no money then. The plaintiff testified that he had never signed any statutory declaration (exh P37) before any lawyer called Musa Dinggat; neither was he given a copy of the said statutory declaration and he never paid any fees to the lawyer. The plaintiff testified that he did not know how to type and did not know how to write letters in English. The plaintiff also testified that at that time he had his own lawyer Hii, from Messrs Hii & Co, Advocates and had instructed Hii to write exh P29. On 20 August 2001, PW14 left Bintulu and a police report was lodged on 21 August 2001 at Balai Beratok about 40 minutes by car from Kuching.

[113] PW15 (L/Kpl 48299 Henry Maluda) testified that he has been with Balai Polis Beratok for five years since year 2000. PW15 confirmed that he did the recording of exh P61 the police report, in which the plaintiff alleged that three persons forced him to sign a document in Bintulu with a lawyer. PW15 testified that exh P61 was lodged on 22 August 2001. PW15 testified that the plaintiff had told him on 22 August 2001 that three persons forced him to sign documents in Bintulu. PW15 testified that he had not written the report on 22 August 2001 because the plaintiff had not brought along his documents and advised Jaya to get them and this was noted in his station diary. PW15 testified that the date when he actually took the report from the plaintiff was on 28 August 2001 and the date 3 December 2001 is a typographical error. I believe that PW15 was an honest witness. He was only educated up to standard six in 1968. He has nothing to gain by not telling the truth.

[114] The plaintiff testified that there are no caves in Sg Bekuyat and Ulu Sg Merirai. The plaintiff testified that PW6 had helped him written a letter to the Forest Department.

[115] Under cross-examination, the plaintiff testified that he was born in Kampung Berasap-Pandan and only had primary school education. In 1975, he worked as a hospital attendant up to 1990. In 1990, he helped his father looked after the caves. The plaintiff maintained that Rumah Berasap and Kampung Berasap were same location inside Pandan — its original name is Kampung Berasap and it is inside Kuala Pandan. Consistent with exhs P4, P6, P8 and P47, the plaintiff testified the route taken from Bintulu to Kampung Pandan is by river via Sg Kemena. The plaintiff testified that at Kampung Pandan there are Punans, Penans and Melanau.

[116] The plaintiff testified that before he filed this case, he had checked and investigated his family tree thoroughly. Bila bin Julai was never married. Bila's

other brothers and sisters did. The plaintiff's grandmother's husband is Lana. The plaintiff testified that, the certification of exh P1, were done by the *pemanca*, *penghulu* and District Office of Bintulu in the presence of PW14's aunties, Chie bt Dolah, Jiharie bt Lana, cousins Othman bin Johari and Ahmad bin Drahman at a meeting with Temenggung Hj Yusuf at *temenggung*'s house. The meeting, the plaintiff testified, was to certify him as rightly owner of the caves. The plaintiff testified that out of the nine heirs to the estate of Bila bin Julai, some were 'waris tumpang' (not 'waris' by birth) for example — Dayang bt Lembu and Russan bin Ummi.

[117] The plaintiff testified that prior to 1995 he made an application to the Sarawak Museum for licence to collect birds' nests; however there was no reply from the Sarawak Museum. The application relates to the birds' nest caves inherited from Bila bin Julai. The plaintiff testified that some caves were so small so it was not listed; however it was certified by the *penghulu*, *pemanca* and district officer for example 'Gua Nulu' in exh P16. The plaintiff was able to confirm that he has applied for licences to all 13 caves, with exception of Lubang Lumujan Nulu 2 and Tengguli. Some of the certificates such as Certificate No 5/K/2/1/54 were from the Rajah Brookes time and was given to the plaintiff by Sarawak Administrative Officer Sebauh — Ambrose Danggat. The plaintiff in reference to the certificate for Nulu 2 and Nulu 1 stated that these two caves are located at Sg Kakus and Sg Merirai in Pandan Protected Forest near to Sg Bekuyat. The plaintiff confirmed that Sg Bekuyat flows into Sg Kakus. The plaintiff testified that there are eight beneficiaries in exh P1, most of whom, have died, and those who survived have given full authorisation to him to manage the 13 caves as sole inheritor. The plaintiff explained that he is the sole heir because the other children of his uncles were adopted children — making them 'waris tumpang' (based on 'belas kasihan') in *adat* Penan. The plaintiff testified that he was given full powers and authorisation around 1997 by the other beneficiaries.

[118] The plaintiff only found out that the first to third defendants had changed the name of the disputed cave Lubang Bukit Lumut to Lubang Peseilu between 1999–2000. The plaintiff testified that he filed this case against the defendants in 2000 as he did not have an opportunity earlier. In 1994, the plaintiff confirmed making a police report against one Tap Timber company for felling and extracting trees which may affect the birds at the birds' nest caves.

[119] The plaintiff testified that he is Melayu Muslim/Penan. The plaintiff testified that the LA dated 10 April 1978 of the estate of Bila bin Julai (exh P49) was revoked because the distribution of estate was completed by Idris bin Rudang. PW12 has seen exhs P10 and P10A, ie the LA taken by Idris bin Rudang for the estate of Bila bin Julai who passed away in 1967 and Idris

Rudang inherited other properties, besides the ten caves mentioned in the LA issued to Idris bin Rudang which had been revoked. A certified true copy of Probate No 1/77 was tendered as exh P49 and a certified true copy of the affidavit was tendered as exh P50. In PW12's experience, there are two situations where an LA may be revoked. One, when there is an heir claiming their right after the issuance of the LA. Two, when the administrator passed away before he can distribute the estate. PW12 testified that Idris Rudang would have been 76 years old by the time the LA was revoked on 21 January 1986 and if the administrator dies before the estate is distributed and the heir to the estate produces evidence of the death of the LA's holder, the LA will be revoked. Therefore, in this case most probably Idris Rudang had died before the estate could be distributed completely.

[120] When referred to exh D7, the plaintiff testified that the disputed cave Lubang Peseilu was never listed and disagreed that the disputed cave is part of Bedawa and connected to Lubang Danau. Lubang Berkat as claimed by the sixth defendant or Lubang Peseilu as claimed by the second defendant in the Native Court case, exh P42 is the same cave as Lubang Bukit Lumut. The plaintiff came to know about exh P42T when he went to the native district court in Tatau in 2001. The plaintiff testified that he has full authority to manage the caves and to commence this action. He testified that the share of profits from the birds' nests collected were distributed to his relatives Ahmad Drahman, Osman Johari, Suliman Busan and Suhaimi Lagob — consistent with exhs P62, P17, P13A, P15 and P1.

[121] The plaintiff testified that the Forest Department had not renewed his license to the 13 caves because the plaintiff commenced this present action against the defendants and that it is not true that the Forest Department refused to renew the plaintiff's licence to the 13 caves because the plaintiff did not have the rights to them.

[122] The plaintiff testified that about 50kg of birds' nests are extracted from Lubang Bukit Lumut for each harvesting period and not 5kg.

[123] Under cross-examination by state legal officer, the plaintiff confirmed that Bila bin Julai is a Penan and Nuri bt Julai is a Penan. Lana is a Melanau. Asahak bin Lana is a Penan-Melanau. Salamah bt Leh is a Melanau, so the plaintiff said he is a Melanau-Penan. The plaintiff testified that Bila and Nuri are converted Muslims, and the plaintiff was born a Muslim. The plaintiff testified that his late father's occupation was a *padi* planter and also collecting birds' nests, rubber tapping, fishing and hunting. The plaintiff testified that he moved to Serian from Bintulu, not because he wanted to be near his wife, Chandayani's Indonesian *kampung*, but because he was threatened.

[124] The plaintiff's testimony on his ancestral lineage and kinship and inheritance of the birds' nest caves is corroborated by the evidence of PW9. PW9 (Tuan Hj Johari bin Bujang) testified that he was the district officer for Bintulu as at 12 January 2004 and that the Sebauh sub-district was under his jurisdiction then. He had searched for and tried to trace through the relevant files at his office and had also asked District Officer Sebauh to try locate ID6, ID7, ID8 and ID9 (at pp 10, 11, 12, and 13 of bundle C) which were eventually tendered as exhs P6, P7, P8 and P9. However, PW9 cannot confirm who sign on exh P6. PW9 testified he has heard of 'P Scanlon' however never met him, and he did not know who was District Officer Bintulu in 1954. PW9 was not able to trace exh D46 (p 14 of bundle C). But PW9 was able to produce a certified true copy of exh P10, LA for Bila bin Julai, which showed that Bila died in 1967 and the LA was granted to his nephew Idris bin Rudang. The LA consists a list of ten caves that include Lubang Bukit Lumut — Ulu Merirai Pandan. PW9 further testified that exhs P10 and P10A are registered at the Register of Probate, Sebauh. PW9 testified that ordinarily exh P4 should be in his office file. He had gone through his office files and was unable to trace exh P4. PW9 confirmed that there is no record of exhs P2, P3 and P4 (pp 1–3 of bundle D) in his files; but suggested that it maybe in the Miri resident's office as previously Bintulu was part of Miri division. PW9 also testified that the Miri resident's office may have old records of birds' nest caves in Niah and Baram district; PW9 was able to trace ID11 in his file, which was not an original copy of ID11 but a certified true copy, which PW9 produced and marked as exh P11A. PW9 was able to produce from his records the death certificate of Penghulu Hj Hamzah bin Keria and LA for his estate, produced and tendered as exhs P44 and P43 respectively. Penghulu Hj Hamzah bin Keria was the other native chief who signed and verified the contents of exh P1.

[125] PW9 testified that it is normal practice for certification of kinship by the *pemanca* or *penghulu*. PW9 testified that among natives, if they want confirmation of kinship of a person, they will go to the *pemanca* or *penghulu* for certification, which is a normal practice. The *pemanca*, *ketua kampung* or the *penghulu* should know the relationship. At that time, the *penghulu* and *pemanca* were attached to the district office. PW9 testified that he had personally met with Temenggung Hj Yusuf bin Mahmud ('PW1') and that PW1 is trustworthy and holds the highest position of native chiefs. He testified that Pemanca Hj Yusuf presently is the Temenggung of Bintulu division, highest in the hierarchy of native chiefs; and that the district office would generally rely on the certification of the *temenggung* on matters such as kinship. PW9 testified that PW1 is quite fragile now, is aging and forgets sometimes. PW9 confirmed that he knew of Penghulu Abdul Rahman bin Sulla who was *penghulu* for Kampung Jepak, now deceased. PW9 testified in reference to exh P34, that he has seen certificate of ownership of caves, and exh P34 was old and date of which cannot be identified. PW9 testified that the last will and testament was prepared for probate and if it is in order he will accept it. In relation to exh P47,

PW9 testified that this document came from the district office's file. PW9 testified that copies of exhs P13 and P14 are found in his office's file. In relation to exh P45 (p 31 of bundle C), PW9 testified that Pemanca Hj Yusof bin Mahmud is presently the Temenggung of Bintulu division and that by exh P45, PW1 certified that the plaintiff is the grandson of Bila ak Julai.

[126] PW9 tendered an original copy of exh P46 (p 32 of bundle C) to show that the plaintiff is the rightful heir to the properties of Bila bin Julai. PW9 testified that it was usual for the Sarawak adminstrative officer to verify kinship, besides the *penghulu*, *pemanca* and *temenggung*. PW9 knew that during the Rajah times' cave certificates were issued and that he had seen such a number of cave certificates before, which are very old documents.

[127] In relation to exh P11A, PW9 testified that usually deeds are registered at the district office and an original copy will be kept there. In relation to ID12, PW9 testified that certification of kinship by Penghulu Hamzah was in his personal capacity. When cross-examined on the existence of cave ownership certificate records — PW9 testified that, 'I believe it exist. But because of time, they may have been lost or moved from office or destroyed by termite'. PW9 clarified that PW1 was the *temenggung* for the Malays as well as Melanaus community of Bintulu. PW9 testified that based on the 1940 Ordinance, if a person does not own a cave he does not have the right to collect birds' nests from the caves.

[128] PW9 testified that the several ethnic groups in Sarawak have integrated and move around in Sarawak and that in Bintulu, the Penan, Punan and Melanau live in the same Kampung Tatau sub-district and Sebauh sub-district were at one time, before 1987, under the Bintulu administration and jurisdiction. Finally, exh P47 was tendered through PW9 (after strenuous objections from the defence counsel).

[129] PW9 was recalled on 24 April 2006. PW9 tendered exh P62, which is an original copy of LA of the estate of the late Bela bin Julai also known as Bila bin Julai as referred to in exh P49. PW9 testified that exh P62 was issued to the plaintiff after being satisfied that the plaintiff is the grandson of the deceased. PW9 testified that the 13 caves listed in exh P17 were not listed in exh P62 because they had been distributed earlier on.

[130] PW9 also tendered exh DD4, which shows that PW1 had verified the details in exh DD4 as 'ketua masyarakat' and 'ketua kaum'. When PW9 was recalled on 31 March 2008, learned counsel for the first to third defendants chose not to cross-examine PW9. This is significant because during the submissions on encl 336, learned counsel for the defendants had, without basis, accused PW9 of lying in his evidence. However now, having given the

opportunities to cross-examine PW9 on the issue, counsel for the defendants had conveniently abandoned it. It was submitted that the first to third defendants now are deemed to have accepted such evidence of PW9 who cannot now be said to be lying. I agree. This proposition is well supported by authorities.

[131] Therefore, PW9's evidence that the 13 caves listed in exh P17 was not listed in exh P62 because they had been distributed earlier on remained unchallenged.

[132] In *Sivalingam a/l Periasamy v Periasamy & Anor* [1995] 3 MLJ 395 (CA) where at p 400, it was held:

> In *Aik Ming (M) Sdn Bhd & Ors v Chang Ching Chuen & Ors and another appeal* [1995] 2 MLJ 770 at p 794, this court when applying the rule in *Browne v Dunn* (1893) 6 R 67 said:
>
> > It is essential that a party's case be expressly put to his opponent's material witnesses when they are under cross-examination. A failure in this respect may be treated as an abandonment of the pleaded case and if a party, in the absence of valid reasons, refrains from doing so, then he may be barred from raising it in argument. It is quite wrong to think that this rule is confined to the trial of criminal causes. It applies with equal force in the trial of civil causes as well.

[133] In *Ayoromi Helen v Public Prosecutor* [2005] 1 MLJ 699 (CA) where it was held at p 669:

> The accused ought to have been cross-examined on the defence advanced by her and failure of the prosecution to do so amounts to an acceptance of the material parts of her defence.

[134] In *AEG Carapiet v AY Derderian* AIR 1961 Cal 359 where it was held:

> Wherever the opponent has declined to avail himself of the opportunity to put his essential and material case in cross-examination, it must follow that he believed that the testimony given could not be disputed at all.

[135] Therefore, having considered the evidence of facts on the customs and *adat* of Penan and Melanau particularly ancestral lineage of the plaintiff as shown in exh P1, I conclude that the plaintiff is the rightful heir to the disputed cave.

COURT JURISDICTION TO GRANT THE DECLARATIONS SOUGHT AND TO DECLARE THE DECISION OF THE Native Court IN EXHS P42/P42T VOID

[136] It is the plaintiff's evidence that he only found out that the first to third

defendants had changed the name of Lubang Bukit Lumut to Lubang Peseilu between 1999 and 2000. It was submitted that both claimants in the Native Court case (exh P42T) had presented a false claim to the disputed cave for the first time in 1995; and the claim was unknown to the plaintiff then. It is to be observed that the plaintiff was never a party to the Native Court proceedings when he found out in 1999–2000 about the second defendant's claim. By then it was already too late for the plaintiff. He could not appeal against the Native Court's decision as the appeal period has expired and neither could he filed even for prerogative writ for certiorari since the period for such application had also lapsed.

[137] It is not disputed that the plaintiff was prevented from intervening in the Native Court to apply to set aside the Native Court's decision in exhs P42T/P42. Because of these circumstances, I have earlier allowed the plaintiff's application to add Along Bangau, the defendant in the Native Court case as the sixth defendant herein and the seventh defendant (ie the Native Court) as a nominal party to the proceedings so that all the issues between the parties may be decided once and for all and properly adjudicated.

[138] I have taken this course of action because I am fully aware that the Native Court is an inferior court. However its decision is not subject to judicial review because under the Sarawak Native Court Ordinance 1992 there is established a heirachy of appeals of the Native Courts decision. However under the same system any question of law decided by any Native Court at any level is appealable to the High Court. I am also of the view that if I do not take this course of action and if I at the end of the day, come to a finding that the Native Court decision in exhs P42 and P42T is void and made without jurisdiction or in clear violation of the express prohibition in s 5 of the Sarawak Land Code then my decision would be at variance with the decision of the Native Court which is an inferior court to the High Court. That situation would not resolve the dispute between the parties as to the ownership of or rights to collect birds' nests from the disputed cave. Instead it would add more confusion to the whole matter. With the sixth and seventh defendants properly before me, I would be in a position to address the issue judiciously and either grant or otherwise the declarations sought by either parties in this present proceedings.

[139] In deciding a claim for NCR, the Native Court is also bound by the provision of s 5 of the Sarawak Land Code, which is the general law as to land matters and NCR claim over lands in Sarawak, which does not permit any claim for NCR after 1 January 1958. In this regard it is pertinent to note that there is no enabling provision in the Native Court Ordinance to enable the Native Court to circumvent the prohibition in s 5 of the Sarawak Land Code in respect of NCR claim; and there is also no provision that gives the Native Court jurisdiction to confer or award rights over the disputed cave to Along

Bangau for the first time in 1995 or in 1997. Otherwise it would open the whole process to abuse where parties can go to the Native Court to lodge their false claims for the first time in 1995 (never previously established before 1958) circumventing s 5 of the Sarawak Land Code (a statutory prohibition) and through 'relinquishment' or 'abandonment' of claim and even at the appeal stage get such illegal claims legitimised.

[140] In respect of the Native Court's decision in exhs P42 and P42T a few salient points in that case must be noted. Firstly, the second defendant in this present action, stated that he discovered the disputed caves in 1995. Along Bangau (the sixth defendant), said he was the one that discovered the disputed cave, also around the same time. Thus, both claims therefore do not pre-date before 1 January 1958. Secondly, when the Native Court decided the case in favour of the sixth defendant and granted him the ownership of the disputed cave; Temuli (the second defendant) filed an appeal to the Native Court of Appeal against that decision. However at the appeal stage, the sixth defendant purportedly relinquished his rights to the disputed cave to the second defendant. Consequently the rights over the disputed caves were conferred or given to the second defendant. It was submitted for the plaintiff that this cannot be right because such conferment or recognition of NCR runs foul of the prohibition in s 5 of the Sarawak Land Code since both Temuli and Along Bangau had grounded their claims for the disputed cave based on a discovery made in 1990s. Therefore the relinquishment of Along Bangau's rights over the disputed cave does not in any way confer any jurisdiction on the Native Court to give the NCR over the disputed cave to Temuli. Even, if there is such jurisdiction, I would say that the exercise of such jurisdiction would be contrary to the general law of the land. In the circumstances, I would therefore, agree with the submissions by learned plaintiff's counsel on this point.

[141] The fact that the defendants in the present action in particular the second and first defendants discovered and staked their claims on the disputed cave only since 1995 is not in dispute. This is evident in exhs D27A and P63. The former is the letter written by the second defendant in 1995 staking the defendants' claim on the disputed caves; and the latter is the affidavit by the first defendant affirming the same fact.

[142] It was submitted that this court has the jurisdiction to entertain the plaintiff's application for declaratory relief in respect of the disputed cave. Section 5 of the Sarawak Native Courts Ordinance 1992 does not give exclusive jurisdiction to hear NCR claims or of claim in nature as in exhs P42 and P42T only in the Native Courts. That section does not exclude the right of anyone to file such cases in the High Court to be adjudicated by a High Court

judge. Section 5 of the Native Courts Ordinance 1992 has not curtailed the broad jurisdiction of the High Court to grant declaratory orders under the Courts of Judicature Act 1964.

[143] It is also doubtful whether the Native Courts can grant the relief prayed for by the parties herein. The plaintiff in his amended statement of claim and even the first to third defendants in their amended counterclaim have prayed for declaratory and injunctive reliefs, which in my view cannot be granted by the Native Court. If that is the case then the Native Courts are in no position to declare exhs P33, P60 and D37 void and unenforceable. It is only the High Court that has such jurisdiction.

[144] In *Barnard and others v National Dock Labour Board and another* [1953] 1 All ER 1113 it was held by Singleton LJ that in the case where the notice of suspension was a nullity, the fact that there was an unsuccessful appeal from it cannot turn that nullity into an effective suspension. Further at pp 1117–1118 of the report, the same learned judge also held that 'in those circumstances an action in the courts could be brought to put right the wrong which otherwise would be done'.

[145] With regard to the issue whether the Native Court as inferior tribunal could disregard the law and if so whether the superior court could intervene to put things right, Denning LJ in the same case at p 1119 said:

> Why, then, should not the court intervene by declaration and injunction? If it cannot so intervene, it would mean that the tribunal could disregard the law.

[146] Further at p 1120, the learned Law Lord held that 'An inferior tribunal cannot by a wrong decision in point of law give itself a jurisdiction which it would not otherwise possess. I should be sorry to think that these courts were powerless to put right such a situation'.

[147] The same principle was followed by the Federal Court in *Eu Finance Berhad v Lim Yoke Foo* [1982] 2 MLJ 37; [1982] 1 LNS 21 where it was held at p 39 (MLJ) that, 'Where a decision is null by reason of want of jurisdiction, it cannot be cured in any appellate proceedings'.

[148] In *Cooper v Wilson and others* [1937] 2 KB 309, the English Court of Appeal held:

> That the appellant was not limited to the right of appeal to the Secretary of State given by the Police Appeals Act 1927 and therefore he was entitled to the declarations claimed.

Where a statutory body is alleged to have acted without jurisdiction its decision can properly be questioned in an action for a declaration that the decision is null and void.

[149] In *Haji Laugan Tarki bin Mohd Noor v Mahkamah Anak Negeri Penampang* [1988] 2 MLJ 85 the Federal Court granted a declaration setting aside decision of Native Court in Sabah in spite of an appeal procedure available. Similar remedy was granted by the Federal Court in *Datuk Syed Kechik bin Syed Mohamed v Government of Malaysia & Anor* [1979] 2 MLJ 101 and *Teh Guan Teik v Inspector General of Police & Anor* [1998] 3 MLJ 137. In the latter the Federal Court held that one cannot simply dislodge the declaratory remedy under O 15 r 16 of the Rules of the High Court 1980.

[150] On the evidence, DW9 (who is also the second defendant in this case) at first relied on his own letter exh D27A which was written in 1995 to show that the defendants have a claim over the disputed cave.

[151] However later in his testimony, DW9 tried to distant himself from this exhibit, by claiming to be uneducated and cannot read exh D27A; but DW9 refused to disclose the name of the person who allegedly helped him wrote exh D27A in 1995. His reason for the refusal is that he had forgotten the name of the person.

[152] However reading the expressed and clear contents of exhs P38, P39, P42T, P24, DD1 and D10 makes the case of the first to third defendants 'incredible'. This is so because the contents of those exhibits do not support the claim by the defendants. And applying ss 93 and 94 of the Evidence Act 1950 to the hard facts of the documentary exhibits, the oral evidence to impeach the contents of the documentary exhibits ought to be disregarded. This is particularly so with regards to the testimony of DW6 in his attempt to interprete the meaning of exhs P38 and P39.

[153] The Court of Appeal in *Telekom Cellular Sdn Bhd (formerly known as MRCB Telecommunications Sdn Bhd) v Kabelect Sdn Bhd* [2000] 3 MLJ 254; [2000] 3 CLJ 503 held at pp 257–258 (MLJ) and p 509 (CLJ):

As the first ground the appellant contended that the learned judge erred in fact and in law in applying s 94 of the Evidence Act 1950 to the abovementioned letter when he refused to allow the appellant to adduce evidence to contradict the contents of that letter. In his judgment the learned judge said:

... If the language is clear and unambiguous and applies accurately to existing facts, it shall accept the ordinary meaning, for the duty of the court is not to delve deep into the intricacies of the human mind to ascertain one's undisclosed intention, but only to take the meaning of the words used by him, that is to say his expressed intentions.

The learned judge was of the view that the words used in the letter were of choice and select — plain and precise in its natural meaning, accurately applying the facts to the case. Therefore, the language being clear and exclusive, no extraneous evidence can be supplied or implied to the contrary or to bring about any other conclusion. To support his judgment the learned judge cited *Smt Kamala Devi v Seth Takhatmal and another* 1964 AIR 859, a Supreme Court of India decision where Subba Rao J at p 869 held:

> Section 94 of the Evidence Act lays down a rule of interpretation of the language of a document when it is plain and applies accurately to existing facts. It says that the evidence may be given to show that it was not meant to apply to such facts. When a court is asked to interpret a document, it looks at its language. If the language is clear and unambiguous and applies accurately to existing facts, it shall accept the ordinary meaning, for the duty of the court is not to delve deep into the intricacies of the human mind to ascertain one's undisclosed intention, but only to take the meaning of the words used by him, that is to say his expressed intentions.

Similar sentiment was expressed by the Privy Council in *The North Eastern Railway Company v Lord Hastings* [1900] AC 260 where Earl of Halsbury LC at p 263 said:

> The words of a written instrument must be construed according to their natural meaning, and it appears to me that no amount of acting by the parties can alter or qualify words which are plain and unambiguous.
>
> So far as I am aware, no principle has ever been more universally or rigorously insisted upon than that written instruments, if they are plain and unambiguous, must be construed according to the plain and unambiguous language of the instrument itself.

[154] Justice Kang Hwee Gee in *Pesaka-Gammon Construction Sdn Bhd v Chuan Hin Electrical Engineering Sdn Bhd* [2004] 1 LNS 423 held:

> But even so, the document speaks for itself — the payment of the sum mentioned therein was to be 'in full settlement of all matters in connection with this sub-contract'. Where the language used in a document is plain in itself and applies accurately to existing facts, the court is bound under s 94 of the Evidence Act 1950 to accept its true purport and may not admit any evidence to show that it was not meant to apply to such facts (*Telekom Cellular Sdn Bhd (formerly known as MRCB Telecommunications Sdn Bhd) v Kabelect Sdn Bhd* [2000] 3 MLJ 254; [2000] 3 CLJ 503 at pp 257–260 (MLJ) and at pp 509–510 (CLJ)). It follows that even if the plaintiff's managing director, Teh Seng Hock had been called he would be prevented from giving any evidence to contradict the cold print of what he has signed for in that document.

[155] The Federal Court in *Tindok Besar Estate Sdn Bhd v Tinjar Co* [1979] 2 MLJ 229 held at p 234:

> For myself, I would with respect feel somewhat safer to refer to and rely on the acts and deeds of a witness which are contemporaneous with the event and draw the reasonable inferences from them than to believe his subsequent recollection or version of it, particularly if he is a witness with a purpose of his own to serve and if it did not account for the statements in his documents and writings.

[156] On the above authorities, it is obvious that in law the court should not allow any extrinsic evidence to be led to explain the true and clear meaning of the contents of documents which were made or filed contemporaneously with the happening of the events referred to in those documents.

[157] The defendants also challenged the plaintiff locus standi to bring this action. On the evidence however, I find no merit on this challenge.

[158] The plaintiff is the rightful heir to the estate of the late Bela bin Julai @ Bila bin Julai, being the sole heir of the 13 caves as verified by PW1 in exh P1 and confirmed by PW9 in exhs P62 and DD4, and recognised by the fourth and fifth defendants having issued the plaintiff licence to collect birds' nests for all the 13 caves. This can also be seen from exhs P17/P17A, P6, P8, P10, P10A, P11A, P47, P49, P50, D23, D23A, D24, D24A, D25 and D25A.

[159] The plaintiff also had been issued with the LA of the estate of Bela bin Julai @ Bila bin Julai on 10 May 2004 for the remaining assets not distributed — marked as exh P62 and probate book marked DD4.

[160] Exhibit P49 shows the name of Bela bin Julai appears at top right corner and the name of Johari bin Sunam appears on far left column as joint 'waris'. Exh P49 encompasses 10 caves listed as part of the estate of the late Bela bin Julai. When exh P49 is read with exhs P50 and P10/P10A/P10B; and finally cross-refers to exh P6 where the Native Officer Sebauh enquired with Tua Kampung Johari who in turn confirmed that '... no one claimed ownership of the cave except Bila'. It is obvious that all the caves belonged to Bela bin Julai and then inherited by the plaintiff. Exhibit P6 came about after exh P8 was issued by District Officer Bintulu directing Native Officer Sebauh to investigate the claim made by Bila bin Julai and after query with Tua Kampung Johari, exh P6 was issued on 25 February 1954.

[161] The evidence by PW9 that the 13 caves were not included into exh P62 because they had been distributed earlier on is corroborated by exhs P13, P13A and P14; and also by PW1's evidence and by exh P1. Moreover exh P47 tendered by PW9 from his district office's file shows clearly that the six caves listed, which included 'Lubang Bukit Lumut', is certified by District Officer Bintulu on 31 May 1954 to be the 'sole property' of Bila ak Julai.

[162] PW9's evidence that the 'caves' had been distributed is also corroborated by exh P11A (the last will and testament of Asahak bin Lana) and independently by exh P17. This latter exhibit was agreed to its existence and contents by the State Attorney General's Chambers as per letter dated 12 July 2002 from the State Attorney General's Chambers.

[163] Thus, exhs P62, P47 read with exhs P6, P8, P10, P10A, P10B, P11A, P13, P13A, P15, P17 and P17A would show that the plaintiff has the locus standi to maintain this action; and the fourth and fifth defendants ought not to raise the locus standi issue because the plaintiff is indeed the rightful heir and grandson of Bela bin Julai (deceased) who derived his rights as heir, owner and licence holder of the 13 caves.

[164] In recognition of the plaintiff's 'rights' as owner and heir of the 13 caves already 'distributed' to the plaintiff, the Sarawak State Government had previously issued to the plaintiff licence for the 13 caves, tendered at the trial as exhs P17 and P17A (at p 176 of bundle C). Furthermore, the evidence of PW6 revealed that his department still issues licence to the plaintiff which covers Lubang Bukit Lumut (or Lubang Peseilu as the defendants called it) and that his department will issue licence only to those who already established their right to birds' nests caves which must be endorsed either by *tuai rumah*, *penghulu*, *pemanca* or *temenggung* and by the district officer who has jurisdiction over the area.

[165] In my view, and on the evidence before me, the plaintiff as heir and owner of the 13 caves, be it under customary rights inherited from ancestors or common law rights, has the requisite locus standi independent of the grant of the LA. PW9 testified in clear terms that the 13 caves had been distributed and therefore had not been included into exh P62 — the LA. Exhibit P62, issued after further verification of lineage, shows clearly that the plaintiff is the grandson of Bila ak Julai, the original owner of the 13 caves from which the plaintiff derived his rights. The plaintiff's claim is truly not dependent on the issuance of exh P62 and the plaintiff can maintain an action even without exh P62. Distinguishable from the facts of the plaintiff's case is a situation where one needs to be issued with LA to commence an action under ss 7 or 8 of the Civil Law Act 1956, eg a road accident case where one dies leaving dependants. In the circumstances, by the above documentary and oral evidence and also by exh P62, the fourth and fifth defendants are precluded and estopped by their conduct from raising the locus standi issue, which is a baseless issue.

[166] In *Tan Sri Haji Othman Saat v Mohamed bin Ismail* [1982] 2 MLJ 177 (FC) it was held at p 179 paras A–B:

The requirement of an interest to sue does not present any problem so long as the administrative act submitted for judicial review is an individual decision, inter alia, in which he is refused something to which he considers himself to be entitled, as in *Mills and another v Avon and Dorset River Board* [1955] 1 All ER 382 where the fisherman obtained a declaration confirming his right to a fishing licence which had been refused to him.

[167] In the present case, and because of the dispute, the fourth and fifth defendants have wrongfully refused to issue birds' nests licence to the plaintiff. For that reason I think the plaintiff has a locus to challenge that decision having regard to the fact that the plaintiff's rights to the caves have previously been recognised by the fourth and fifth defendants.

[168] Applying the Federal Court's case of *Tan Sri Haji Othman Saat v Mohamed bin Ismail*, the plaintiff contended that by exhs P17, P62, P49, P50, read with exhs P1, P2T, P6, P8, P47, P10A, P10B, P11A, P13A, P15, P21/P21A and with the evidence given by PW1, PW6 and the other witnesses of the plaintiff, which are consistent with the plaintiff's case, one cannot say that the plaintiff does not have any locus standi. I agree. The documentary exhibits conclusively point to the fact that the plaintiff is the rightful heir or 'sole heir' of the 13 caves, inherited from Bila bin Julai.

[169] Therefore the fourth and fifth defendants had improperly and unlawfully accepted and issued licence to the first, second and third defendants to include the disputed cave.

THE PLAINTIFF NOT BARRED BY RES JUDICATA

[170] The judgment of Penghulu Maggai does not affect the plaintiff in any way and the plaintiff is not barred by res judicata. The plaintiff is not a party to the said dispute in Native Court Case No CC/CIV/96/6, and had no knowledge of the matter until very much later after judgment of Penghulu Maggai was pronounced. The plaintiff's rights is never decided by Penghulu Maggai in the said judgment. After the judgment of Penghulu Maggai, the sixth defendant relinquished his rights in favour of the first to third defendants. Thus, the sixth defendant is no longer interested in the matter. In *Chua Wee Seng v Fazal Mohamed* [1971] 1 MLJ 106, it was held that res judicata does not apply to strangers in the proceedings. See also *Hollington v F Hewthorn & Company Limited* [1943] 2 All ER 35 (CA); *Perumahan Farlim (Pg) Sdn Bhd & Ors v Cheng Hang Guan & Ors* [1989] 3 MLJ 223 (SC); unreported decision of Richard Malanjum J (as he then was) in Originating Motion No K 25–09 of 1997.

[171] Moreover, the issues raised by the plaintiff vis-a-vis the defendants regarding the ownership and rights to the disputed caves are real issues and not theoretical.

[172] In *Russian Commercial and Industrial Bank v British Bank for Foreign Trade, Limited* [1921] 2 AC 438 (HL), Lord Dunedin held at p 448:

> The rules that have been elucidated by a long course of decisions in the Scottish courts may be summarised thus: The question must be a real and not theoretical question; the person raising it must have a real interest to raise it; he must be able to secure a proper contradictor, that is to say, someone presently existing who has a true interest to oppose the declaration sought.
>
> In my opinion, unless you are to rob declarations of much of their real value, this is a case in which a declaration ought to be given.

WHETHER THE PENANS AND MELANAUS CAN CLAIM CUSTOMARY RIGHTS OVER BIRD' NESTS CAVES

[173] PW7 (Empeni Lang), the chief registrar of the Native Courts of Sarawak and its chief administrator, testified that the rights to birds' nests are similar to rights to land. PW7 further confirmed that 'right to birds' nests is the right to harvest birds' nests conferred on owners of caves who have customary rights'. PW7 tendered the handwritten notes by Penghulu Maggai in the Native Court Case No CC/CIV/96/6 in Bumiputera Court, Tatau as exh P42. PW7 confirmed as chief registrar, he has access to exh P42 kept at the registry in Tatau. PW7 testified and confirmed that the presiding judge Penghulu Maggai found in favour of Along ak Bangau, the sixth defendant in this action. PW7 further confirmed that there is no decision by superior court to reverse the decision of Penghulu Maggai and therefore the decision of the Chief Native Court stands. PW7 testified that he had substantial knowledge of NCR, had been consulted and gave lectures on customary laws. He testified that 'rights to birds' nests concerned rights to collects birds' nests; the rights are created by way of discovery of caves by pioneer founders who created the rights. The rights is transmitted to the descendants of common lineage within the family'. PW7 testified that birds' nests right cannot be sold or transferred outside the family. It is a family inheritance under the customs. It is family property.

[174] PW7 further testified that the right to birds' nests caves cannot be lost through migration or abandonment unlike NCR to land. Such rights over birds' nests caves cannot be transferred through agreement unless within the family lineage as the right is created by ancestors and only for the descendants. PW7 supported this testimony by producing a case law, *Sidau ak Sipok v TR*

Bilong ak Keseng (Appellate Native Court Case No R/3/94) (exh marked 'P44') which clearly shows the principle that rights inherited is not extinguished by migration.

[175] PW7 testified also that he gained his NCR's knowledge through his 34 years service in dealing with field administration including Baram district which has lot of birds' nests. PW7 served as Resident of Bintulu which includes Ulu Tatau — an area with lot of birds' nests — where he encountered the problems from 1995. PW7 testified that he has produced amendments of the native *adat* laws and also commissioned to do research of birds' nest by Majlis Adat Istiadat. PW7 confirmed that there were regulations and local orders made by the Rajah Brooke administration and the residents recognising cave ownership rights such as the 1905 Resident Douglas of Baram Order pertaining to cave ownership and birds' nest regulations and the 1940 Decree of Rajah Brooke. Then there is the Edible Birds' Nests Ordinance 1940 that came into operation that brought about the birds' nest certificates. PW7 testified that he knew the words 'Pasar' or 'Pasen' in exh D24 to mean 'Pasen' in Punan — meaning compartment in a cave. 'Lubang' means cave, and in one *Lubang* there could be more than one 'Pasen'.

[176] Under cross-examination, PW7 testified that the disputed cave does not exist and that Penghulu Maggai's decision still stands today. PW7 testified that the Native Court has jurisdiction over all native customary laws and NCR. PW7 testified and maintained that as Resident of Bintulu from 1 January 1987 to 15 July 1991, Sebauh is a sub-district of Bintulu district and Pandan is within the Sebauh sub-district; and that Ulu Pandan and Ulu Kakus rivers meet. PW7 further said that Bukit Lumut and Ulu Pandan also meet and that the Bedawa caves is located at Bukit Lumut.

[177] When crossed-examined by the senior state legal officer, PW7 testitfied that he also gave talks which include land matters under customary rights of all native groups and enforcement of native customary laws. PW7 testified that the Penan come under Orang Ulu groups. PW7 testified that rights to birds' nests are almost similar to rights to land and governed by s 5(2) of the Sarawak Land Code.

[178] PW7 testified that the right to birds' nest caves means ownership rights and rights to collect birds' nests. PW7 testified that 'if Temuli made his claim in 1995, then the same principle apply — that he cannot establish any customary rights'. Thus based on exh D27A, the first to third defendants cannot have claim over the disputed cave. PW7 also agreed that based on exhs P38 and P39, the disputed cave and Lubang Bedawa is not connected.

[179] PW8 (Mr Patrick Rigeb ak Nuek) testified that he is a former magistrate concerned with NCR and presides in the Chief Native Court up to District Native Court. PW8 testified that he had presided over NCR claims over land and NCR claims over caves. He also had produced a book — *Dayak Bidayuh Community Ritual Ceremonies and Festivals 2002*. Between 2 May 1995 to 2 May 2000, PW8 was appointed presiding officer of Resident Native Court for whole of Sarawak. PW8 testified that a 'native' as defined in the Schedule to Sarawak Interpretation Ordinance can acquire customary rights over caves.

[180] PW8 detailed the process in which one establishes rights over caves. He testified that 'when someone discovered a cave with birds' nests, he is entitled to collect the edible birds' nests in the caves. That is the recognised practice among the natives in Sarawak'. He further testified that to acquire ownership rights, the discoverer of the caves has to apply to the district officer ('DO') and the DO will investigate to ascertain whether the claim is genuine or not. The DO will inquire from the *tuai rumah* and *penghulu* of the area concerned whether the claim by the applicant is genuine or not. In relation to PW8's evidence on this point, exh P8 (the certificate of ownership) was issued on 25 January 1954 by the DO of Bintulu existed. PW8 testified that 'ownership' meant the right to own caves as well as to collect birds' nests. Ownership of birds' nest caves exists before the white Rajah came to Sarawak and the Rajah's interest was revenue and the preservation of the swiftlets.

[181] PW8 testified that in 1905, before the ordinances were passed, there was a system of registering the caves and the purpose of the legislation and ordinances was to regulate, protect and confirm the cave ownership rights. PW8 testified that he acquired knowledge on how a person acquires caves rights by presiding over court proceedings, through what he had heard and seen during those proceedings. PW8 testified that he also acquired his knowledge from his association with the birds' nest collectors and inquiring into how their ancestors acquired the rights over caves.

[182] PW8 testified that 'the right of the owners of the caves are never extinguished, despite the repeal of the ordinances'. PW8 confirmed that he has seen a certificate of cave ownership and from the official records that he had seen, PW8 knew that P Scanlon was a district officer during the colonial times. PW8 testified and elaborated at length his knowledge on acquisition of birds' nests ownership from first hand information gathered from his time in service as administrative officer and that gathered from the heads of community.

[183] PW8 explained from one of the native cases he presided (exh P44) that unlike NCR over land, caves ownership rights cannot be lost through abandonment; the reasons being the people in the area knew from the founder's

past activities that he owned the caves — cave rights are inheritable — that it is the custom of the people that caves rights cannot be lost. PW8 testified that the *tuai rumah*, *penghulu* and elders of that area can verify this history and it was submitted that PW1 was such a witness for the plaintiff.

[184] PW8 testified that 'NCR to bird's nest caves cannot be lost through abandonment and that is the custom and practice throughout Sarawak'. The above evidence is not refuted and as such it was submitted that PW8's evidence should be accepted.

[185] When cross-examined by the senior state legal officer, PW8 maintained that native customary laws throughout Sarawak are similar. PW8 testified that though the definition of 'owner' in the ordinance did not say about ownership of caves, by customs, the owner owns the caves. PW8 maintained that the ownership of caves by customs has not been codified. The 1940 Ordinance was passed to protect and preserve customary rights. PW8 maintained that the birds' nest caves' rights were not codified in Tusun Tunggu as it was entrenched to the owner of the caves only and so few are inherited. PW8 maintained and confirmed the ways an owner can lay claims to cave prior to 1958 and that no new claims can be made after 1958.

[186] In re-examination, PW8 confirmed that the ownership of caves and rights to collect birds' nests is the same and such rights can be extinguished by legislation but such legislation to extinguish must be democratic and fair and provide for compensation, these rights being protected under the Constitution.

[187] The testimony of PW7 and all other plaintiff's witnesses on birds' nest ownership rights and rights to collect birds' nests, also find support in a passage at p 106 of *Swiftlets of Borneo — Builders of Edible Nests* by Lim Chan Koon and Earl of Cranbrook, (2002), Natural History Publications (Borneo), Kota Kinabalu which reads as follows:

> In 1992, after six years of international disputation and local disorder, the state of Brunei ceded the Baram district (which then included Niah) to Rajah Charles Brooke. The incoming Sarawak administration appreciated the importance of the birds' nest trade, and rapidly took steps to regularise its control. Operators were required to register their cave rights and certificates of ownership were issued. In order to allow the swiftlets to raise at least one brood a year, harvesting was permitted only at regulated intervals. In 1901, WH Furness was told that three harvests a year were customary. Later this was reduced to twice annually, for two 60 day periods in January–March and August–September. Under this management, as recorded by Charles Hose, who entered the Sarawak civil service at the age of 20 in 1884 and served in the Baram district until 1904, the annual trade in black nests at Niah amounted to about 50 tons, equivalent to over 3.5 million nests.

[188] The evidence shows that ownership is bestowed on the person who found the caves and inherited by descendant of a common lineage. PW7 testified that the ownership rights still continues today; and the right remains even when the laws are repealed — only the rules governing the edible birds' nests were repealed, not the ownership. The rights to collect birds' nests are not extinguished just because the license has not been renewed.

[189] There is no dispute that the 1940 Order of Rajah recognises ownership rights over caves. It was an order made for the proper collection and auction of edible birds' nests and repealed the 1911 Order. Under the order, 'cave' means a cave containing edible birds' nests and includes any part of such cave. It is also pertinent to note that s 3 of the 1940 Ordinance states clearly 'No person other than a native shall be the owner of any cave containing edible birds' nests ...'. This section clearly recognises ownership rights to the caves which contains birds' nests. Section 5 also expressly uses the word 'owner.' Further, it was submitted for the plaintiff that the 1940 Order was introduced by the Rajah not to violate or take away the natives' rights and is not inconsistent with the NCR over birds' nests caves, which were similar throughout Sarawak but to recognise the same and to preserve and regulate its business or affairs, which was similar throughout Sarawak at that time and that was why the 1940 Ordinance/Order made no distinction between the rights of the various indigenous natives in Sarawak, except stating that only natives have such rights. I agree with this submission. At paras 441 and 443 at pp 26–27 of *Halsbury's Laws of England* (4th Ed), the learned authors state:

> Custom, being in effect local common law within the locality where it exists, can only be abolished or extinguished by Act of Parliament. An Act of Parliament may abolish a custom either by express provision or by the use of words which are inconsistent with the continued existence of the custom.

[190] At p 28, it said:

> It appears that the custom would not be affected by the repeal of the Act if the Act merely confirmed and recognised the custom.
>
> Such a statute may merely have the effect of sanctioning the validity of the custom as a custom, without merging the custom in the higher title by statute.

[191] PW10, Mr Nicholas Bawin ak Anggat was the Ketua Timbalan Majlis Adat Istiadat Sarawak. PW10 does research into native customs and traditions and gives talks on the subject. He was quite familiar with native rights and customary laws in Sarawak. PW10 testified that customary rights to birds' nests are quite similar to customary rights to land. PW10 testified that a person can claim NCR over caves. The cave must be found by the founder and if he dies it passes down to next of kin or sibling or children. This is the *adat* rights and such

rights cannot pass to a third party. The founder of the cave has the rights to collect birds' nests in the caves and sell it and they can also hunt and collect jungle produce in order to establish customary rights. PW10 further testified that NCR exist over caves and this right extends to ownership of caves. He also testified that the Rajah recognised the rights to cave ownership. There is no legislation passed to cancel or abrogate right of ownership to birds' nests caves and that the 1940 Ordinance was passed to protect, recognise and confirm the rights of the cave owners. PW10 testified that the rights over the caves cannot be lost even if it is not registered under the 1911 Order. PW10 testified that the *adat* in Kakus relating to birds' nest is similar to that of Baram, Bau and Serian. Thus, the right is similar throughout Sarawak.

[192] Having regards to the above evidence, I am of the view that the NCR over bird's nest caves in Sarawak has been recognised since the white Rajah days. More than that, the Rajah administration then had taken step to regulate those rights, including the ownership of the caves. However, as for today, and in the light of s 5 of the Sarawak Land Code, those rights could only be claimed if it can be shown that it subsists prior to 1 January 1958.

EXHIBITS P33, D37 AND P60 SHOULD BE DISREGARDED

[193] The defendants contended that through these three exhibits they have shown that the plaintiff has renounced his rights over the disputed cave.

[194] However the plaintiff contends that exh P33 (the deed) and exh P60 (the letter dated 20 August 2001), referred to at paras 7–10 of the statement of claim, and even exh D37 (statutory declaration of Jaya Asahak) are all procured from the plaintiff through unlawful ways and means and therefore are void and unenforceable.

[195] That exhs P60 and P33 constitute an agreement in restraint of legal proceedings and had the effect of ousting the jurisdiction of the Native Court in Case No CC/TTU/02/2000(C-4) commenced by the plaintiff on 30 November 2000 and were obtained by unlawful means and ways ie by coercion and threat of physical harm on the plaintiff and into discontinuing or procuring the dismissal of the said Native Court action, contrary to ss 14, 15, 19, 24 and 25 of the Contracts Act 1950 and contrary to public policy.

[196] Furthermore, PW2, PW7, PW8 and PW10 had already testified that no new rights could be created over birds' nests caves after 1 January 1958 and the rights once acquired by the pioneer before 1 January 1958 could not be abandoned nor transferred to third party non-family members and could only be passed down or inherited by family members. The first, second and third defendants asserted purported rights over the disputed cave in 1995 as shown

in exhs D27A and P63. Therefore the first to third defendants could not have acquired the NCR over the disputed cave.

[197] On the transfer of NCR to another party by way of conveyancing, Dr Hj Hamid Sultan bin Abu Backer JC (as he then was) in *Bisi ak Jinggot @ Hilarion Bisi ak Jenggut v Superintendent of Lands and Surveys Kuching Division & Ors* [2008] 4 MLJ 415; [2008] 1 LNS 245 held at pp 436–437 (MLJ):

> ... I do not think NCR can be transferred by modern conveyancing instrument of transfer as it could not have been prima facie part of the NCR and/or practice.

[198] Further support for the proposition is also found in s 19 of the Forest Ordinance (Cap 126) which states very clearly that:

> 19 Notwithstanding anything herein contained, no right admitted or privilege conceded under section 8 shall be transferred by way of grant, sale, lease, mortgage or otherwise, except with the authority of the Chief Minister.

[199] Exhibits P60, P33 and D37 cannot confer on the first to third defendants any NCR in common law or any rights whatsoever in 1995 or year 2001 over the disputed cave which the first to third defendants called Lubang Peseilu, which was never established before 1 January 1958. Exhibits P33, P60 and D37 lacked any consideration for the plaintiff abandoning his rights or to discontinue or to cause the dismissal of Native Court Case No CC/TTU/02/2000(C-4) commenced on 30 November 2000 contrary to s 26 of the Contracts Act 1950. No evidence was led to show the plaintiff had paid to the first, second and third defendants nor to their solicitors the said sum of RM20,000 referred to at cl 2 p 2 of exh P33 (deed) or that the Ministry of Forest had issued to the plaintiff the purported letter in writing referred to at preamble C p 1 of exh P33. The plaintiff testified he had never instructed nor retained Messrs Sia & Ha Advocates, Bintulu and has never instructed nor retained advocate Musa Dinggat to prepare exhs P33, P60 and D37. Further, the plaintiff has never paid any legal fees and had never received any bill.

[200] Exhibits P24, P38, P39 and P42T/P42 would clearly be against the first to third defendants purported claim. This court also cannot ignore the judgment of a competent Native Court that had gone against the first to third defendants.

[201] Also there is no head of community of the area concerned who has come forward to support or substantiate the purported claims of the first to third defendants. Exhibits P2, P2T, P3 and P3T also exposed the first to third defendants' false claims.

[202] DW3 also testified that there was no prior discussion with the plaintiff before the signing of exhs P60, P33 and D37. He also confirmed in his evidence that on the day of signing exh P33, the plaintiff on his own walked to the office of Messrs Sia & Ha Advocates and he reached there at 10am.

[203] If that is the case, the truth of exhs P33, P60 and D37 must be suspected because it begs the question as how did exhs P33, P60 and D37 come about when the plaintiff and the first to third defendants at that time were having acrimoneous relationship?

[204] According to DW9, he and the plaintiff were in a tight 'feud' over the disputed cave where allegedly men of the plaintiff cut off the tip of DW9's index finger. DW9 confirmed in cross-examination that his relationship with the plaintiff was not good and he could not remember having a 'cozy relationship' with the plaintiff. Yet DW3 expects the court to believe that after such a bitter relationship, the defendants called on the plaintiff out of the blue to sign exh P33.

[205] It was submitted that the cave rights or customary rights to the disputed cave, ie Lubang Bukit Lumut or what the first to third defendants call Lubang Peseilu, cannot be transferred by deed (exh P33). Further, such cave rights or customary rights to the disputed cave cannot be 'lost' or 'relinquished' through either exhs P60, P33 and D37. In the circumstances, exhs P60, P33 and D37 are all void and of no consequences.

[206] Decided cases also suggest that customary rights cannot be transferred by 'instruments': *Bisi ak Jinggot @ Hilarion Bisi ak Jenggut v Superintendent of Lands and Surveys Kuching Division & Ors*; *Galau & Ors v Penghulu Imang & Ors* [1967] 1 MLJ 192 and *Sat ak Akum & Anor v Randong ak Charareng* [1958] SCR 104.

[207] There are other reasons why exhs P33, D37 and P60 should be disregarded.

[208] Exhibit D37, the purported statutory declaration of the plaintiff, did not bear the stamp and seal of a qualified or certified interpreter. As for exhs P60 and P33 there were evidence of threats and unlawful elements inflicted on the plaintiff.

[209] PW2 confirmed that the plaintiff never paid the RM20,000 contemplated by cl 2 of exh P33 (deed) and therefore by operation of cl 6, the deed shall be treated as void due to non-payment of the RM20,000. If exh P33 is to be treated as 'void' then exh P60 would fall automatically.

[210] DW4 testified that he cannot recall the date of signing exh P60 but the date on the letter suggested that it was on 20 August 2000. He also cannot recall whether exh P60 was signed at his office in his presence. Yet he can recall explaining the contents of exh P60 to the plaintiff. If DW4 cannot recall when exh P60 was signed in his presence, DW4's subsequent answers that he did explain the contents of exh P60 to the plaintiff is highly suspected.

[211] DW4 further testified that he has no knowledge whether the plaintiff signed the deed under duress. He cannot recall the demeanor of the plaintiff when the plaintiff signed the deed. Under examination-in-chief, DW4 could not recall so many things that may not be favourable to the defendants. He also did not know whether the deed exh P33 was signed prior to the statutory declaration exh P37 or otherwise. He cannot recall the time of the day when the deed, exh P33 was signed. As such, truly DW4's evidence that the plaintiff signed the deed (exh P33) willingly ought not to be accepted.

[212] Under intense cross-examination, DW4 finally revealed that he acted for the first to third defendants and that the instructions came from them who were his clients. DW4 resiled from his earlier evidence that he did not take instructions from the first defendant. This is a serious departure from his earlier testimony on this point.

[213] As for exh D37, DW5 confirmed that there is no independent translation or seal of an independent certified or qualified translator. DW5 testified that he just witnessed the attestation to exh D37. He was not familiar with NCR on birds' nests caves. He was also unaware of any threats on the plaintiff.

the first to third defendents failed to establish their linkange and inheritance over the disputed caves

[214] DW1 testified that she did not know if Bila and *temenggung* were related and that she did not know if they went from Mererai to the disputed cave. DW1 failed to prove that 'Badok ak Angot' is her grandfather and if comparison is made between exh D50 with exh D51, one will notice that there is another name of 'Badok ak Simon' appearing on exh D51. So who is who in reality, their doubtful identity, remains a mystery.

[215] When compared with the evidence of DW9 (the second defendant) given in 1997 in the Native Court, DW9 has never mentioned a word about 'Angut' or 'Anyut' or 'Angut ak Nyaring' or 'Badok ak Simon'. In exh D49, there is the name of 'Angut' which is not the same with 'Angut ak Nyaring' in exh D52. Further, 'Badok ak Simoh (f)' is shown to be a 'female' in exhs D52 and D49; and not a 'male' as suggested by DW1. Even DW9 said that 'Badok'

is his grandfather; but exhs D52 and D49 show otherwise. Therefore, the evidence of DW1 and DW9 on this issue seems incredible. A

[216] Exhibit D49 shows purported four pasen in Lubang Berdawa only, which purportedly belongs to 'Angut'. None of the first to third defendants' witnesses was able to show who this 'Angut' is or whether 'Angut' is 'Anyut' or whether 'Anyut' or 'Angut' are the same 'Angut ak Nyaring'. B

[217] There is no proof of identification of who 'Angut' or 'Anyut' or 'Angut ak Nyaring' is. C

[218] Exhibit P24 shows that as at 12 May 1993, the Sarawak Museum purports to recognise only four pasen or pasar in Lubang Berdawa allegedly belonging to the first to third defendants, the licence of which expired on 31 December 1993. Even exh D52 speaks of only four pasen and does not speak about the disputed cave. D

[219] The *Gazette* at p 3 of bundle G also does not help as it does not cover the 'area' of Banjaran Bukit Lumut and one must never assumes that the *Gazette* covers Banjaran Bukit Lumut as PW9, PW1 and PW13 had testified that other ethnic natives, ie the Penan and Melanau, also live in the Kampung Berasap-Pandan and have acquired cave rights. E

[220] DW1's own affidavit, exh P63 shows that the defendants have filed a claim over the disputed cave only in year 1995 or 'since 1995' and not earlier. In her evidence, DW1 confirmed that exhs D10 and P24 did not mention Lubang Peseilu and DW1 admitted that Banjaran Lumut is situated at Merarai-Kakus area. F

[221] In answer to a question by learned counsel for the plaintiff, DW1 admitted the disputed cave is located much higher than Lubang Bedawa on Banjaran Lumut. When shown exh P2, DW1 (the first defendant) confirmed that exhs P3/P3T was referred to in exhs P2/P2T. DW1 even agreed with the contents of exhs P2/P2T. If we peruse exhs P2 and P3, these two exhibits refute the first to third defendants' claims to the disputed cave; as in exhs P2 and P3, the first to third defendants are not entitled to look for new caves. G H

[222] Exhibits P42 and P42T also show the first defendant was not a party and did not give evidence in the Native Court. It shows that as at 1997, the first defendant had no rights to the disputed cave because she was never a party who fought Along Bangau (the sixth defendant) in the Native Court case. I

[223] There is nothing in exh P42T or any evidence at all to suggest that ancestors of the second defendant had inherited the disputed cave and even the names of their purported ancestors were never mentioned in exh P42T. DW2 did not testify in the proceedings before the Native Court. There is no evidence at all adduced in exhs P42T/P42 to suggest that the second defendant had inherited the disputed cave before 1958. Even Penghulu Maggai did not endorse the purported claims of the second defendant over the disputed cave.

[224] Most importantly, in cross-examination, DW1 was thoroughly evasive when it came to answering question about exh P33 (the deed). DW1 was not sure who appointed Messrs Sia & Ha Advocates but answered as if the second defendant had appointed Messrs Sia & Ha Advocates. One can safely infer from the answer given by DW1 that the plaintiff was forced to sign exh P33.

[225] In a claim by Bapai ak Athey in year 2001 against the first to third defendants in the Native Court, DW1 lodged a defence and when cross-examined, DW1 agreed that in their defence they never mentioned about the existence of the disputed cave as part of Lubang Bedawa. This by itself cast serious doubts on the case of the first to third defendants. In spite of the existence of court order for injunction, DW1 signed off rights to collect birds' nests, which included the disputed cave, to a third party vide exh P64. It is pertinent to notice that, inspite of strong challenge mounted, DW1 has not given any evidence at all to substantiate their claim that the Lubang Bedawa were inherited from their ancestors and there is no evidence that Lubang Peseilu is part of Lubang Bedawa. DW1 refused to produce any evidence of ancestral link or lineage to substantiate their purported claim. In fact, exhs D49 and D52 showing 'Badok ak Simoh (f)' to be a female would refute the cooked-up story of DW1 that Badok is her grandfather.

[226] The first to third defendants seem to rely on DW2's evidence to support their claim. However, I find the reliance is misplaced. DW2 was never involved in the case before the Native Court between the second defendant and the sixth defendant and he was not even there. And that he did not know the second defendant when Penghulu Maggai decided on the case. DW2 also cannot identify the cave entrance shown in exh P55, though he testified that he had been to Lubang Bedawa. DW2 testified that he does not know about Lubang Peseilu at Bukit Lumut and did not even know that the cave is being disputed between the plaintiff and the defendants. DW2 also testified that the purported Lubang Peseilu, the disputed cave does not have its own entrance. This testimony contradicts with the testimony of DW1, the first defendant, who testified that the purported Lubang Peseilu has its own separate entrance. When challenged on this, DW2 said 'maybe Munggau is right'. DW2 also contradicted himself when he testified that he knew that by exh P2 and exh P3, no one from that *kampung* can stake any claim to new cave which includes

Lubang Peseilu. DW2 even did not produce any evidence to show if Bilong ak Keseng was his brother as alleged. Their names — Kupa ak Kanyan and Bilong ak Keseng — would show that they have no connection and are not brothers. DW2 even admitted that his father was not 'Keseng'.

[227] DW2 really did not know Badok or Simoh and had come to court to conjure a case of ancestral link to support the first to third defendants' claim over the disputed cave. In my opinion DW2 had lied in court. He was shown two documents, exhs D52 and D1 which show that Badok ak Simoh is a female, whereas, he testified Badok ak Simoh is a male. When challenged as to the accuracy of the two documents, DW2 simply answered he did not know. He also did not know the real truth when he said in his testimony that only the Punans are the inhabitants of Kakus and there are other race also visiting that hill. He further testified that he did not know whether the Penan or Melanau people may have acquired cave rights to Bukit Lumut area. He also testified that he had no knowledge whether Rudang bin Julai, Sunam bin Julai, Lembu bin Julai, Imun bin Julai, Kilong bin Julai, Idris bin Julai and Bila bin Julai (the ancestors of the plaintiff) may have acquired cave rights on Bukit Lumut. On the other hand, DW2 agreed with the suggestion by counsel for plaintiff in referring to ID27 that the second defendant discovered the disputed cave only in 1995. The inconsistencies in the testimony of DW2 make him an unreliable witness.

[228] DW3's evidence is also in conflict with the evidence of DW2. DW2's evidence was that the sixth defendant dug the cave entrance as shown in exh P55(1). However exh P42T, which is the record of the Native Court's proceedings shows that the second defendant (DW2) never spoke anything at all about the sixth defendant having dug a hole.

[229] DW3's evidence is also unreliable because DW3 gave three different versions in relation to the signing of exhs P33 and D37. The first version is that he did not know how the plaintiff went to the lawyer's office at that time to sign the deed (exh P33). However in one part of his testimony DW3 confirmed that the plaintiff on his own walked to the office of Messrs Sia & Ha Advocates and he reached there at 10am. He also testified there was never any meeting between the first and second defendants or himself to arrange for any discussion relating to the plaintiff's relinquishment of his rights. Instead DW3 testified that exh P60, exh P33 and exh D37 at p 80 of bundle I were all signed on one single date. After the alleged signing took place, the plaintiff was allowed to go back. And that he never saw the plaintiff in Bintulu again.

[230] The second version by DW3 is that the plaintiff brought DW3 to the office of Messrs Sia & Ha Advocates.

[231] The third version is that the plaintiff went to the office of Messrs Sia & Ha Advocates first and he was waiting there. Then DW3 came later.

[232] On these inconsistencies and contradictions, the plaintiff's counsel sought to impeach DW3. But it was refused. I refused the impeachment because I think the inconsistencies and contradiction only affects the credibility of DW3's testimony and the weight to be attached to his evidence. The inconsistencies and contradictions in this instant do not pass the test in *Public Prosecutor v Munusamy* [1980] 2 MLJ 133, for impeachment proceeding to be initiated. However, that does not mean that the court should accept DW3's evidence without testing it against all other evidence adduced in this case.

[233] Exhibits P38 and P39 show that there were birds' nests at the cave entrance itself. This is corroborated by exhs P55(1) to P55(12).

[234] Exhibits P38 and P39 would refute the claim by the first, second and third defendants over the disputed cave. The plaintiff has complained about documentary evidence being concealed. From exh P39, the 'ground mapping' had not been produced by the State Attorney General's Chambers. The original 'ground mapping' could well be destroyed or concealed. If there is no explanation as to the whereabouts of ground mapping, adverse inference ought to be drawn under s 114(g) of the Evidence Act 1950 against the first to third defendants who failed to produce the 'ground mapping' done as reflected in exh P39. Irrespective of production of the 'ground mapping', exhs P39 and P38 nevertheless stand as proper reports by DW6.

[235] The Federal Court in *Tindok Besar Estate Sdn Bhd v Tinjar Co* [1979] 2 MLJ 229 held at p 234:

> For myself, I would with respect feel somewhat safer to refer to and rely on the acts and deeds of a witness which are contemporaneous with the event and draw the reasonable inferences from them than to believe his subsequent recollection or version of it, particularly if he is a witness with a purpose of his own to serve and if it did not account for the statements in his documents and writings.

[236] DW6 agreed that the map at back page of exh D10 shows only one cave entrance and that it does not show two cave entrances. However, DW6 does not know who issued exh D10 and does not have personal knowledge of the contents of exh D10. So how could DW6 have accepted exh D10 as correct?

[237] Closer scrutiny of DW6's evidence shows that its supports for the plaintiff's case instead of the defendants' claim on the disputed cave.

[238] It is also pertinent to note that DW3 repeatedly testified that he supported the facts contained in exh P63 (affidavit of the first defendant) where the first defendant made her claim to the disputed cave 'since 1995'. Thus, this testimony further cast doubt on the defendant's claim over the disputed case.

[239] DW3 testified that the first defendant had showed him ID27/D27A but earlier DW1 testified that 'I have never seen ID27'. It was submitted that DW1 had tried to distant herself away from ID27 because they (the first, second and third defendants) have made a false claim to the disputed cave only in 1995 and have no established customary rights before 1958 on the disputed cave. This fact is evident from the testimony of DW3 who testified that before 1995, based on this affidavit, the first, second and third defendants never found the cave, Gua Peseilu, and they have no claim.

[240] DW6's testimony also does not assist the first to third defendants' case. DW6 testified that he is not a speleologist and neither is he a cave expert. He had no training in respect of cave expertise. He is also not an expert in NCR on caves. Neither is he a qualified surveyor. He is also not familiar with the Punan, Penan and Melanau languages. He is also not a specialist in ground mapping.

[241] By his oral evidence, DW6 tried to deviate from the contents of exhs P38 and P39, the documents that were prepared by DW6 himself, and which were filed contemporaneously with the dispute in the Native Court as per exh P42T; thus making the oral evidence of DW6 incredible and ought to be disregarded pursuant to ss 93 and 94 of the Evidence Act 1950.

[242] DW6 agreed that customary right to birds' nests is established by the founder and the cut off date is 1 January 1958. DW6 also agreed that 'Lubang Peseilu' is not mentioned in exh P24. Under cross-examination, DW6 stood by the contents of his letters marked exhs P38 and P39. DW6 confirmed that exhs P38 and P39 relates to exh P55(1). DW6 confirmed that 'Sg Merarai/Kakus' is stated on exhs P20, P21, P21(A) and P21(B).

[243] DW6 testified that he did not interview PW1 to determine whether Ulu Sg Merirai meant to them the Bukit Lumut area. Neither did he interview any Penan or Melanau community leaders to determine whether Ulu Sg Merirai meant to them the Bukit Lumut area.

[244] In his testimony, DW6 agreed that today birds' nests licences are issued by the Sarawak Museum and Forest Department to the rightful owners. The testimony would refute the case of the fourth, fifth and seventh defendants that there are no 'ownership' rights in caves. In fact there are 'ownership' rights to birds' nests caves as shown by the book by Earl of Cranbrook.

[245] DW8 testified that he spoke with Tuai Rumah Bilong who told him that the rights to collect birds' nests in Lubang Peseilu belonged to the second defendant. This is hearsay. It does not prove the second defendant has the right to collect birds' nests at the disputed cave. At best, such statements may show that it was made.

[246] Under cross-examination, DW8 testified that he was aware of Penghulu Maggai's decision in the Native Court Tatau dismissing the second defendant's claim to the disputed cave and confirmed that he cannot disregard the decision of Native Court. DW8 also agreed that there was nothing in writing to show Tuan Rumah Bilong ak Keseng had sanctioned or supported the claim to the disputed cave. It was submitted therefore that when DW8 prepared exhs D43 and D44, he was aware of the existence of exhs P38 and P39 but had disregarded or kept mum on them and had not mentioned anything in exhs D43 and D44 about the existence of exhs P38 and P39. Both exhs P38 and P39 would refute the case of the first to third defendants and show that the disputed cave is not connected to Bedawa caves complex. There was never any evidence to show that DW8 wrote to DW6 to challenge the contents of exhs P38 and P39. In fact, both exhs P38 and P39 remained unchallenged until today and the fact that DW8 went out to conceal their existence show him being biased towards the first to third defendants.

[247] When shown exhs P2, P2T, P3 and P3T, DW8 denied ever seeing any of them. However, shortly later, DW8 changed his evidence stating that, exh P2 and exh P3 were in the District Office of Tatau's file but not the translation and that when he wrote exhs D43 and D44, he did not mention about the existence of exhs P2 and P3 in exhs D43 and D44. The plaintiff submitted that it was obvious why DW8 had initially lied about not having seen exhs P2 and P3; that was because exhs P2 and P3 would show that as early as in 1988 itself DW8's predecessor Mr Wilfred Jolly had issued out a warning to all those concerned in the area and especially to TR Bilong and in turn TR Bilong Keseng had issued exh P3, warning Eta ak Bado that 'It is prohibited to search for new cave', which means that DW8 had either lied to the court about what TR Bilong had said to him or that TR Bilong simply could not have said to DW8 that the second defendant had rights to the disputed cave.

[248] DW9 (the second defendant) testified that 'the disputed cave itself was found in the past but the entrance was only found in 1995'. However, such claim was never mentioned in exh D27A (the second defendant's letter of 1995) nor was it mentioned in exhs P42T/P42 when the second defendant and his witnesses testified in the Native Court. Exhibit P24 issued in the past does not support DW9's above evidence.

[249] The explanation given by DW9's as to why it was necessary to apply for a new name for the disputed cave is highly incredible because it was raised the first time and never disclosed such purported facts in exh D27A that he wrote in 1995 and even in exh P42T when DW9 gave evidence in the Native Court, he never mentioned such facts.

[250] In cross-examination, DW9 tried to distant himself away from exh D27A which he wrote in 1995 by a surprise statement that he did not write exh D27A but deliberately concealed or refused to disclose the identity of the purported 'author', which the plaintiff submitted was written by DW9 himself.

[251] In exh D27A, DW9 stated in para 2 'daripada hasil pengembaraan kami jauh ke dalam Lubang Bedawa maka terserempaklah kami dengan sebuah Lubang lagi yang kami gelar Lubang Peseilu yang kami tuntut ...' in 1995 and in exh P63, also the first defendant's affidavit, at paras 4 and 8, the first defendant has stated that the first, second and third defendants have laid claim to the disputed cave since 1995. All throughout his evidence, DW9 maintained that he cannot read and write. But learned counsel for the defendants Mr Allan Lao also conceded in the re-examination of DPW1 that the second defendant (DW9) could read and write. Therefore, I agree with the plaintiff counsel's submissions that DW9 is an untruthful witness whose evidence cannot be believed.

[252] In exh P42T (Native Court proceedings), both DW9 and his witnesses had never testified that the disputed cave is 'connected' to 'Danau' and as such DW9's first time evidence in saying that the disputed cave is connected with 'Danau' ought to be rejected especially in the light of exhs P38 and P39 that would refute such story and also in the light of exh P24 read with exhs D27A, P63 and even exh D10.

[253] Also, it is absolutely pertinent to note that DW9 had never challenged the evidence of 'George ak Dong' whom DW9 confirmed to be his former employee who testified in the Native Court proceedings (exh P42T) that the '... Jalan masuk ke Lubang tersebut tidak sama dengan jalan masuk Lubang kepunyaan Temuli ...', which goes to show that DW9's first time story before this court that the disputed cave is 'connected' to 'Danau' had been cooked up.

[254] DW9 also could not establish his purported ancestral lineage to 'Angut' or 'Anyut' or 'Angut ak Nyaring' or even 'Badok ak Simoh (f)'. DW9 was also unable to produce any LA to show their purported link to 'Angut' or 'Anyut' or Angut ak Nyaring' or even 'Badok ak Simoh (f).'

[255] DW10's evidence does not assist the first to third defendants' case. In cross-examination, DW10 agreed that the first to third defendants have no

right to claim the disputed cave especially after DW10 was shown exh D27A (the second defendant's letter of 1995) and exh P63 (the first defendant's affidavit) both showing that the purported claim were laid only 'since 1995'. DW10 testified that after seeing all those documents he has some doubt about the claim made by the claimant, the second defendant. DW10 also testified that, the Pejabat Daerah Tatau had never verified the identification of 'Angut' or 'Anyut' and he did not inquire from the community leaders at the purported meeting whether Badok ak Simoh was the heir of 'Angut' or 'Anyut'.

[256] As to the issue of limitation as a defence it was submitted that it is inapplicable. The matter of the deed, exhs P33, P60 and D37 took place on 21 August 2001 and this present action was filed on 10 January 2002 well within time. There has been continuous unlawful trespass into the disputed cave and the continuous unlawful occupation does not give the first to third defendants a prescription to stay in an unlawful occupation. Equity will not allow a statute to be used to advance a fraudulent claim on the disputed cave by the first to third defendants.

THE DEFENDANTS' COUNTERCLAIM

[257] To support their counterclaim, the defendants relied on the evidence of the defendants' witnesses in defending their case against the plaintiff's claim and also on the evidence of DPW1 (Nyipa ak Tinggang). DPW1 testified that he was a forest guard with Bintulu Forest Department for the past 11 years or so until 1997 and his duties were also to inspect caves and the disputed cave, that his area of duty as a forest guard covered the Banjaran Lumut Range. He testified he knew about the disputed cave Lubang Bukit Lumut and that the defendants' Lubang Peseilu did not exist. DPW1 confirmed positively that there were edible birds' nests in the disputed cave. DPW1's evidence is in harmony with the hard evidence shown in exhs P55(1) – P55(12) and exh P39. During the course of his work as a forest guard, DPW1 reported back to his Forest Department to inform that birds' nests are found at Lubang Bukit Lumut; about ten feet away from the cave entrance. DPW1 testified that he reported the matter to PW6, his senior officer then. This piece of evidence remained unchallenged. The defence did not cross-examine DPW1 at all on this point.

[258] DPW1 also testified there is no restriction to disallow other races except the Punan from going up and claiming cave rights on Lubang Bukit Lumut. DPW1 testified that he had gone into the disputed cave, all the way and confirmed that it is not connected with 'Danau' or with the Bedawa caves complex. DPW1 even disagreed with the drawing, exh D17(A) and the drawings attached to exh D7. DPW1 refuted DW7's story that the cave is narrow and no birds' nests is found at the cave entrance. This seems to be

consistent with exhs P39, P38 and P55(1) – P55(12). DPW1 also confirmed that there are no holes at the tail end of the cave, to go to another cave chamber. So the disputed cave is not connected to the Bedawa cave system.

[259] DPW1 also testified that his brothers William and Herman worked for the second defendant previously in 1995 and after some time, they stopped as they complained that the second defendant 'cheated' them as the licence to collect birds' nests was not valid that the second defendant had showed DPW1 another cave certificate not the same with exh D10.

[260] DPW1 testified that the distance between Lubang Bedawa and the disputed cave is about one hour walk between Lubang Bedawa and Lubang Bukit Lumut which is higher on the mountain range; this is not challenged. DPW1 also had a discussion with Penghulu Maggai who told him that 'Lubang Peseilu the disputed cave' did not exist.

[261] Having heard DPW1 and the others witnesses for the first to third defendants, on the balance of probabilities, I think the first to third defendants have no claim on the disputed cave.

CASE OF THE FOURTH, FIFTH AND SEVENTH DEFENDANTS

[262] Events have overtaken exh P42T where presently the fouth and fifth defendants have recognised and issued the first to third defendants with licence to include Lubang Peseilu. Originally the first to third defendants only had rights to four 'Pasen' or compartments in Lubang Bedawa.

[263] Effectively, the fourth and fifth defendants have violated and unlawfully gave away the plaintiff's rights in Lubang Bukit Lumut to the first to third defendants. Presently the fourth and fifth defendants have even refused to issue the plaintiff with his usual licence to the 13 caves listed.

[264] To be noted is r 7(1) of the Wildlife Protection (Edible Birds' Nests) Rules 1998, which states 'A licence issued under these Rules shall not be transferable'. Thus, the licence is personal in nature. It has been shown that the first to third defendants and the sixth defendant do not have any previously established NCR, common law or any rights whatsoever over Lubang Peseilu (arising before 1 January 1958) which is in fact Lubang Bukit Lumut. Therefore the licence issued by the fourth and fifth defendants to the first to third defendants after 1995 for Lubang Peseilu does not confer any rights or interest to or over the said cave. This is obvious from the reading of r 8(1) of the Rules which states 'The issue of any licence under these Rules shall not confer upon the licensee any rights or interest to or over any caves or any land upon

which collection of edible birds' nests is permitted under the licence' and such complications are created by the issuance of the said licence, caused by the fourth and fifth defendants.

[265] The plaintiff however has agreed not to pursue damages and costs against the fourth and fifth defendants on the understanding that if the plaintiff succeeds here, the fourth and fifth defendants would issue licence to the plaintiff. But the plaintiff did not waive or abandon prayers (1), (2), (3) (A & B), (4), (5), (6), (7) (A, B & C), (8), (9), (10), (11), (12) and (13) against the fourth, fifth and seventh defendants.

THE PLAINTIFF'S CASE AGAINST THE SIXTH DEFENDANT

[266] The sixth defendant has 'renounced' his purported rights over the disputed cave, which he called Lubang Berkat in the Native Court case. The sixth defendant has not even entered appearance to this action when served with the amended writ and amended statement of claim on 11 October 2006. The sixth defendant has completely refused to attend these proceedings inspite of being served with the trial notices.

[267] It was submitted that the sixth defendant had been properly made a party as the sixth defendant inspite of the fact that he has no rights in the first place and has renounced his claims to the disputed cave purportedly created in 1995. The existence of exhs P42 and P42T make it material that the sixth defendant be enjoined to properly adjudicate this present action.

[268] The declarations sought are the only available remedy because the plaintiff is not a party to the said Native Court case exhs P42/P42T in Tatau between Temuli ak Lawai (the second defendant) and Along ak Bangau (the sixth defendant). The plaintiff had been prevented from intervening and applying to set aside the said decision of Penghulu Maggai.

[269] Mr Ling Kai Siew, Pendaftar Mahkamah Bumiputra Tatau (the seventh defendant) had in his letter dated 11 October 2005 suggested that the plaintiff joined the sixth defendant as a party to the present action. Further, the sixth defendant has refused to come forward to refute the plaintiff's claim to the disputed cave. It is also necessary to bring the sixth defendant because the Native Court apparently had acted without jurisdiction when it decided in favour of the sixth defendant in the Native Court case against the second defendant since the disputed cave was discovered only in 1995. But s 5 of the Sarawak Land Code does not recognise any NCR claim established after 1 January 1958.

[270] The Court of Appeal in *Cooper v Wilson and others* [1937] 2 KB 309 held: A

> Where a statutory body is alleged to have acted without jurisdiction its decision can properly be questioned in an action for a declaration that the decision is null and void. B

[271] The sixth defendant had been brought as a party but had refused to come forward. The sixth defendant was served with the amended writ and amended statement of claim dated 4 September 2006 on 11 October 2006. Till the end of the trial on 25 November 2008, the sixth defendant did not file any defence and did not lead any evidence at all. It is plain that the plaintiff's averments in the amended writ and amended statement of claim dated 4 September 2006 had not been refuted by the sixth defendant. C

[272] Further, adverse inference ought to be drawn against the sixth defendant under s 114(g) of the Evidence Act 1950 for refusal to come forward. D

CONCLUSION

[273] On the evidence and established facts of this case I will allow the plaintiff's claim and grant to the plaintiff the relief in prayers (1)–(5) against the first to sixth defendants. I also grant to the plaintiff the relief sought in prayers (6)–(8) against the first to third defendants. Further, I will grant to the plaintiff's prayer (9) and direct that the fourth and fifth defendants to rectify the Licence No BC0750 to collect or sell edible birds' nests or any licence issued or to be issued to the first, second and third defendants by excluding the diputed cave and to issue to the plaintiff the licence for the same in compliance with this order. As for prayers (10) and (11) these are no longer necessary with the determination of this court as to the NCR and ownership of the disputed cave. Therefore, I make no orders on these two prayers. I will also grant the plaintiff the injunctive order sought in prayer (12) to restrain the first, second and third defendants either by themselves or by their agents and/or servants from interfering or harming whatsoever the plaintiff's rights and/or use of the said birds' nests caves and particularly Lubang Bukit Lumut/Lubang Peseilu. Accordingly, therefore, the first to third defendants' counterclaim against the plaintiff is dismissed with costs to the plaintiff. E F G H

[274] As to damages, I shall order that general damages in prayer (15) be assessed by the registrar. I will also allow the plaintiff's prayers for aggravated and exemplary damages in prayer (16) as I found that the first to third defendants have attempted to deprive the plaintiff from enjoying the rights to collect birds' nests from the disputed cave, by filing a claim before the Native Court which was clearly without basis and contrary to s 5 of the Sarawak Land I

Code. Furthermore, the first to third defendants had, by the use of threat of violence, forced the plaintiff to sign over the rights and ownership of the disputed cave in exhs P33 and P37. This damages is also to be assessed by the registrar. However, I will not allow the plaintiff's claim for special damages in prayer (14) because in my opinion, the plaintiff has failed to adduce evidence in court to justify the award of such damages.

[275] As to damages for trespass and/or conversion in prayer (17), I find that this head of damages could have overlapped with the claim for damages. Further, the nature of the case is that the first to third defendants could have made a genuine mistake in thinking the cave that they discovered is a new cave and therefore staked their claim on the finding of the cave albeit in 1995. This possibility is very probable because there was also a competing claim over the same disputed cave by the sixth defendant that resulted in the Native Court case as evidenced in exhs P42 and P42T. Furthermore, the loss to be assessed under this head of damages in the circumstances of this case would be limited to loss of use and loss of profit from the sale of the birds' nests collected from the disputed cave. These losses in my view could be taken into account in the assessment of general damages. As to the damages on conversion, again I think this is limited to a certain extent because prior to the final determination of this case, the court has granted the plaintiff injunction to restrain the first to third defendants from interfering with and harvesting birds' nests from the disputed cave. Thus, if at all there is conversion as alleged it came to an end with the grant of that injunction. Therefore, I do not think that in the circumstance there is any justification to award this head of damages to the plaintiff.

[276] I will also not make any order as to damages against the fourth, sixth and seventh defendants because the plaintiff and the fourth, fifth and seventh defendants have came to an agreement on this issue.

[277] As for the costs of this action, I shall order that the first to third defendants pay costs to the plaintiff and costs to be taxed unless agreed. As between the plaintiff and the sixth defendant I shall order that each party pays its own costs. As between the plaintiff and the fourth to fifth defendants there shall be no order as to costs as agreed by the parties.

[278] Finally, I want to put on record that the trial of this case has been long and protracted. At the end of the trial when all parties have closed their case, parties requested for time to file their respective written submissions. The plaintiff and the State Attorney General's Chambers (for the fourth, fifth and seventh defendants) eventually filed their written submissions. But the first to third defendants and their counsel until the date of this judgment have failed to file their written submissions despite several extensions of time given. Thus, this judgment is given without the benefit of considering the legal submissions

by counsel for the first to third defendants. As for the sixth defendant, there was no response at all. The sixth defendant has not filed any defence to the plaintiff's claim though have been duly served with the writ of summons and the statement of claim as well as other cause papers. Apparently the sixth defendant has abandoned his rights over the disputed cave and no longer has any interest in the outcome of this trial. The seventh defendant is only a nominal defendant.

POSTSCRIPT

[279] After I have sent a brief version of this judgement (about 17 pages) to Kuching High Court for it to be read and delivered in open court on 2 March 2010, I received through facsimile a skeletal written submissions from learned counsel for the first to third defendants. That was on 25 February 2010. As such I was not able to address the submissions in the brief judgment that was read in Kuching. However in the course of preparing this fuller version of the judgment I had given the submissions my utmost considerations. But in the light of the evidence and factual matrix of this case I am not persuaded by it.

Plaintiff's claims allowed in part with costs.

Reported by Kohila Nesan